No. 91-44

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

STEVEN I. RADLOFF AND BARBARA RADLOFF,

Petitioners,

vs.

FIRST AMERICAN NATIONAL BANK OF ST. CLOUD, N.A.; and FIRST FARM CORPORATION, INC. OF ST. CLOUD, a Minnesota Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether a lender's confiscation of debtors' property in an undisclosed conspiracy with debtors' managerial employee violates § 106(b)(1) or (3) of the Bank Holding Company Amendments of 1970?

2. Whether the record contains issues, which includes the lender's intentional destruction of debtors' property interests, supporting debtors' claims for a violation of the Bank Company Holding Act [12 U.S.C.S. § 1972(1)(a) or (c)], trespass, tortious interference, and restraint of trade?

3. Whether a bankruptcy estate's conveyance to Chapter 7 debtors [approved with finality by the United States Bankruptcy Court] can be estopped in state court by a lender who has unclean hands?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceeding in the Minnesota Court of Appeals [Supreme Court Rule 14.1(b)].

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. _____

STEVEN I. RADLOFF AND BARBARA RADLOFF,

Petitioners,

vs.

FIRST AMERICAN NATIONAL BANK OF ST. CLOUD, N.A.; and FIRST FARM CORPORATION, INC. OF ST. CLOUD, a Minnesota Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

Petitioners Steven I. and Barbara Radloff (hereinafter "Farmers") respectfully petition that a writ of certiorari be issued to review the judgment of the Minnesota Court of Appeals entered April 24, 1991, affirming the trial court's grant of summary judgment.

OPINIONS BELOW

The opinion dated February 5, 1991, of the Minnesota Court of Appeals, affirmed a trial court's grant of summary judgment. The Minnesota Court of Appeals and trial court decisions (A6 & 14, respectively) are unpublished.

This case has a previous appellate history. The Minnesota Court of Appeals reversed the trial court's grant of partial summary judgment on a statute of limitation issue, published at 455 N.W.2d 490 (Minn. App. 1990), rev. denied, July 13, 1990. The opinion published at 455 N.W.2d 490 (Radloff I) partially conflicts with the unpublished opinion (Radloff II), (A6), on the issue of whether Farmers had a property interest in crops and land seriously injured or destroyed by Respondents (hereinafter "Bank"). This was an intentional act of destruction. Farmers' interest in this property was determined as fact in the published decision, but not the unpublished decision. The unpublished decision does not cite or acknowledge the existence of the published opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.S. § 1257(a). The decision upon which jurisdiction is claimed is the judgment entered by the Clerk of Appellate Courts on April 24, 1991. A petition for review to the Minnesota Supreme Court was denied on March 27, 1991. (A3). Farmers' petition for rehearing was denied on April 18, 1991. (A1). Under Supreme Court Rule 13.4, this petition is timely; it is filed within 90 days of the denial of the petition for rehearing and judgment.

PROVISIONS OF STATUTES INVOLVED

The statutory provisions of Title 12 United States Code, Section 106(b) & (e) of Pub. L. No. 91-607, 84 STAT. 1760, known as the BANK HOLDING COMPANY ACT AMENDMENTS OF 1970 [12 U.S.C.S. §§ 1972(1) & 1975] provides, in relevant part, as follows:

> (b) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement -
>
> (1) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
>
> . . . .
>
> (3) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;
>
> . . . .
>
> (e) Any person who is injured in his business or property by reason of anything forbidden in subsection (b) may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

The below statutes and rules refer to the bankruptcy estate's conveyance to Farmers of a right to sue First American National Bank of St. Cloud, N.A. under 11 U.S.C. § 554 (See A41 & 46-47).

The Bankruptcy Reform Act of 1978, as amended, 11 U.S.C.S. § 350 (1984), provides, in relevant part, as follows:

§ 350. Closing and reopening cases.

(a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.

(b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

The Bankruptcy Reform Act of 1978, as amended, 11 U.S.C.S. § 554 (1984), provides, in relevant part, as follows:

§ 554. Abandonment of property of the estate.

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

The Bankruptcy Reform Act, as amended, 11 U.S.C.S. § 102 (1984), provides, in relevant part, as follows:

§ 102. Rules of construction. In this title--

(1) 'after notice and a hearing', or a similar phrase--

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but (B) authorizes an act without an actual hearing if such notice is

given properly and if --

(i) such a hearing is not requested timely by party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

PROVISIONS OF RULES INVOLVED

The Local Bankruptcy Rule 115 (1983) for the United States Bankruptcy Court for the District of Minnesota provides, in relevant part, as follows:

RULE 115. SALE: ABANDONMENT: OTHER DISPOSITION

(a) With General Notice. Except as provided in paragraph (b) of this rule, and unless the court orders otherwise in a particular case or proceeding, the clerk shall give not less than 20 days notice by mail to all creditors and other parties in interest with respect to any proposed sale, abandonment or other disposition of property by the trustee including the compromise or settlement of controversies.

(b) Without General Notice. Pursuant to § 102(1) of the Code and Rules 2002(i) and 6007 permitting the court to fix or reduce the notice, and unless the court orders otherwise in a particular case or proceeding, and if the United States Trustee files a certificate stating that the United States Trustee has reviewed and agrees with reduced notice and the proposed action, property of the estate if any shall be sold, if value to the estate of the property to be sold is less than $1500, abandoned or otherwise disposed of by the trustee including the compromise or settlement of controversies without further written notice to creditors except not less than

4 days notice by mail, excluding Saturdays, Sundays and legal holidays, to those creditors if any who have filed with the clerk a request in writing that all such notices be mailed to them under Rule 2002(i) and each member of a creditors' committee if any elected under § 705 of the Code, and if no creditor has requested such notice and there is no creditors' committee, then no notice to creditors is necessary.

STATEMENT OF CASE

A. Proceedings and Disposition in the Courts Below.

Farmers commenced this lender liability case on various claims against Bank, who forced them into bankruptcy on June 20, 1985, intentionally destroyed 35 acres of asparagus crowns, and similarly interfered with their repurchase of more asparagus acreage in July 1987. After evidence was obtained in the initial discovery proceedings, Farmers moved the trial court (at that time Judge Roger M. Klaphake of Morrison County District Court, Seventh Judicial District of Minnesota) and were granted leave to add a count under the Bank Holding Company Act on May 24, 1989.

On September 25, 1989, Judge Roger M. Klaphake[1] denied Bank's motion for summary judgment, except for granting partial summary judgment on the issue of whether a state statute of limitation barred the Farmers' claims against the Bank for intentional destruction of their asparagus crop. Farmers appealed and on May 15, 1990, the Minnesota Court of Appeals, in an opinion published at 455 N.W.2d 490 reversed the trial court's grant of partial summary judgment on this issue. The Bank petitioned the

[1] Judge Klaphake soon thereafter became an appellate judge for the Minnesota Court of Appeals.

Minnesota Supreme Court to review that issue and it was denied on July 13, 1990.

On July 19, 1990, Judge Timothy J. Baland, Judge Klaphake's replacement, granted Bank's second motion for summary judgment applying federal statutory and common law.

Farmers appealed to the Minnesota Court of Appeals, which affirmed in an unpublished opinion dated February 5, 1991. (A6). Farmers petitioned the Minnesota Supreme Court for review and said petition was denied on March 27, 1991. (A3). Farmers filed a petition for rehearing on April 5, 1991, and said petition was denied on April 18, 1991. (A1).

Farmers petition this Court to review the federal claim under the Bank Holding Company Act (BHCA) and the state court's misapplication of this Court's summary judgment precedent to the BHCA and the claims of trespass, tortious interference with contract or business advantage, and restraint of trade. Bank raised and has been granted summary judgment on the affirmative defenses of judicial and equitable estoppel, based on federal bankruptcy statutes. Common law and Farmers petition this Court for certiorari to review this judgment as well, since the state court collaterally attacked the United States Bankruptcy Court's adjudications and applied federal common law.

1. Bank's Intentional Destruction of Farmers' Property.

The record shows that on May 27, 1986, the Bank, with the specific intent to destroy, had a pilot aerially attack 35 acres of asparagus crowns with a deadly custom mixture of chemicals. (A42-43). Bank's purpose was to prevent the Farmers from acquiring the crops and competing with them in the marketplace. (A155-156). All 35 acres were killed or rendered commercially worthless. (A44-45). The land was knowlingly injured as well (A102). These asparagus crowns are perennial crops (lasting 15-20

years) and the net present value was calculated by an agricultural economic expert to be worth over $500,000.00.[2] Bank, after Farmers were wrongfully forced into bankruptcy, obtained a stipulated right to harvest only 25 acres of these crops. (A56, 57, 62). This stipulation expressly limited Bank's right to become owners in these crops if it removed them by no later than May 15, 1986. (A56). The 25-acre lease expired with very little removal. (A62, 182) Bank demanded an extension and Farmers initially refused. Then Bank, through its co-conspirator Mr. Ambuehl, threatened Mr. Radloff with physical harm.[3] (A154). Bank then paid Ambuehl $9,215.00. (A106-107). Farmers agreed to extend the 25-acre lease to expire on midnight May 27, 1986, for $10,000.00. (A62). On the evening of the last day of this coercively extended 25-acre lease, Bank had all 35 acres of asparagus drenched with a deadly combination of Roundup 2 (a contact killer) and crop oil (an inoculant). (A42). Bank's admitted motive was to prevent Farmers from acquiring and selling the crop in competition with Bank in the marketplace. (A44). Bank also knew it would injure the land along with the crops. (A102).

On July 18, 1988, Bank threatened to "chemically burn" more asparagus crops. (A146). This threat was renewed in July 1987, (A147) which influenced the owner of the Sheriff's Certificate of Sale, Mutual of New York Insurance Company (MONY), to convey the property to Bank, despite Farmers' higher bid, and

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[2] When these asparagus crowns are transplanted into production beds, every acre of crowns expands to 7 acres of plants producing spears for 12 to 15 years. Bank effectively destroyed 250 acres of production asparagus. (A123).

[3] *State v. Ambuehl*, 176 N.W.2d 893 (Minn. 1970) [while on duty as a police officer, Ambuehl, in conspiracy with others, was convicted of burglary against a merchant].

would have closed sooner than Bank's. (A86, 150).[4]

2. Facts Relating to Bank Holding Company Act Claims.

After this litigation commenced on June 3, 1988, Farmers uncovered evidence of several prior acts of deception by Bank.

Evidence adduced, but not addressed below, establishes that for two years prior to Farmers' bankruptcy petition of June 20, 1985, Bank controlled Farmers by daily monitoring their cash in two checking accounts. (A71-76). Bank would hold money from executed but partially unfunded promissory notes, until checks that Farmers wrote (after obtaining Bank's prior approval) were presented for negotiation. (Id). Bank's employees confirmed this unwritten cash control system was unusual.[5]

In November 1984, Bank induced Farmers to turn over $23,243.19 in cash from Farmers. (A93). Farmers earmarked the money to an already late real estate mortgage payment. (A80-81). Bank agreed that this money was not subject to any security agreement. (Id). Bank represented that it would pay Farmers' late mortgage payment to the mortgagee, MONY. (Id). Bank never fulfilled that representation relied upon by Farmers, since its officers had previously already made written plans to liquidate Farmers' assets. (A81). The record also shows Bank's handwritten notes that establish a plan to force Farmers into bankruptcy. (Farmers' First Trial Appendix, Exhibits G8-13).

In April 1985, when Bank again committed to provide funds, Farmers relied upon Bank's custom and practice. (A82). Bank did not fund this last commitment. Id. Instead, on April 29, 1985, Bank secretly diverted $10,000.00 from one of Farmers' enterprises

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[4] MONY also considered these crops to be perennial crops, fixtures of the soil. (138, 143).

[5] See quote from Ms. Sauer's Deposition (A 70-71, 78-79).

to Mr. James Ambuehl (at that time Farmers' farm manager), then paid Ambuehl $1,200.00, opened a new checking account with Ambuehl under the name of Country Fresh Produce, and began to operate Farmers' business. (A82-83, 90 & 116-117).[6] The checkbook ledger from Country Fresh Produce shows from April 29, 1985, to May 8, 1985, Ambuehl and Bank secretly operated Farmers' business (A116). After these covert acts occurred, Bank threatened Farmers with criminal prosecution for writing "bad" checks, by withholding the funds previously committed.[7] (A159-161). Farmers were thereby coerced into signing over their operations to Bank on May 8, 1985.[8] Except for the threat and failure of Bank to perform pursuant to their promises, these covert acts were unknown to Farmers until after this case was filed. (A83).

Since Bank controlled their operations and refused to pay the real estate mortgage payment, Farmers filed for Chapter 11 protection on June 20, 1985. A foreclosure sale scheduled for the same date of Farmers' real estate was forestalled by the bankruptcy petition. On October 11, 1985, their bankruptcy proceeding was converted to a Chapter 7 petition.

In February 1986, being suspicious, but without evidence, of the pre-bankruptcy conspiracy, Farmers asked for an abandonment

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[6] One day later Mr. Ambuehl wrote out a check to a third party in the sum of $16,731.00, not out of the new CFP account, but out of Farmers' account which he knew was without money on deposit. (A 160).

[7] Farmers were not represented by an attorney in this transaction. (A 101). The lower courts erred on the record.

[8] One company which filed criminal charges (Evergreen Equipment) against Steven Radloff was a Bank customer and Mr. Ambuehl's former employer. (A 94, 160).

under 11 U.S.C.S. § 554 to them of the right to sue Bank for the pre-bankruptcy wrongs. (A161-163). The interim bankruptcy trustee contemplated this transaction for almost two months. (A162). Under Local Rule 115(b) (promulgated under 11 U.S.C.S. § 102), the interim trustee submitted the transaction to the United States Trustee who approved of it on May 12, 1986. (A47).

As noted above, on May 27, 1986, Bank intentionally attacked and destroyed Farmers' crops and land with deadly chemicals. On July 18, 1986, Bank threatened to do it again; on July 15, 1987, Bank renewed this threat. Due to the threats against the crop, MONY awarded the bid to Bank despite Farmers' higher bid. (A63, 144-145). "Plus, it was the later [post-bankruptcy] additional activities, the personal threat, the [crop] bombing, and the 1987 interference that helped us to understand and aid our investigation into the earlier acts." (A89).

This litigation was commenced on June 3, 1988. The interim trustee reviewed the pleadings and, after consultation with the United States Trustee, decided not to intervene. (A162-163). On November 28, 1989, the United States Bankruptcy Court closed the case under 11 U.S.C.S. § 350, which approved with finality the abandonment to Farmers of the right to sue Bank. (A41).

REASONS FOR GRANTING THE WRIT

The term lender liability is a euphemism that covers the many civil claims normally pled against a perpetrating lender. The one federal claim that promotes justice between a lender and its debtor is the Bank Holding Company Act. This Court has yet to interpret this statute as amended in 1970. With the current problems of mismanaged financial institutions throughout this country, direction by this Court is needed. Farmers' case presents a good factual basis upon which to interpret this act. Whether this Court applies

the statute as written or adopts the read in anti-competitive language, Farmers' case should go forward.

What is needed to survive summary judgment and establish a claim under this act is not the same among circuits. The statute should be read as it is clearly written. Subsections (1)(A) and (C) of the BHCA have to same theme: (A) uses the term "shall obtain" while (C) uses "provide." Supra p. 3. To establish a claim under either subsection a party must show:

1. they were customers of a national bank;
2. that the bank extended or agreed to extend credit or any service;
3. that the bank fixed or varied the consideration of any of the foregoing, on the condition or requirement that the customer shall obtain (or provide) some additional (a) credit, (b) property, or (c) service to such bank.

Only under Subsection (1)(c) do the customers need to show that they were required to provide such additional credit, property, or service other that those related to and usually provided in connection with a loan, discount, deposit, or trust service.

Support for this plain language interpretation is predicated upon precedent from this Court addressing statutory construction, infra p. 16-17, and upon the legislative history of the 1970 Amendments. The economic power of the banking industry stems from the aggregate control by banks over credit, along with a "'disturbing trend . . . toward erosion of the tradition separation of powers between the suppliers of money--the banks--and the users of money--commerce and industry.'" S. Rep. 1084, 91st Cong, 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News 5519, 5557, 5558 (supplementing views, Senator Edward Brooke (quoting a statement of then-President Richard Nixon). In light of this unique economic role that banks play, Congress perceived

conditional transactions in the extension of credit by banks more strigently than had the Supreme Court under general anti-trust statutes. Id. at 5558 (letter of Assistant Attorney General Richard McLaren).

A. Claims Under the "Shall Obtain" Subsection (1)(a) of the BHCA Language is Clear and should be Applied as Such.

Farmers were forced to obtain the managerial services of Country Fresh Produce, operated by Mr. Ambuehl, and become liable under the funds deposited within the Country Fresh Produce Account. (A108). The trial court held that such a coerced transaction was not unusual banking practices, disagreeing with legal precedent and the record. (A37). The Minnesota Court of Appeals held that there was no proof of an anti-competitive effect. (A11). Had these lower courts applied the statute as written, their interpretations should have allowed for claims to go forward.

The other courts addressing the issues are quite varied. It should be clear from the statute that anti-competitive effect is not required, and under subsection (1)(a) a showing of nontraditional banking practices is also unnecessary. Unusual banking practices are required only under subsection (1)(c). Direction from this Court is needed to differentiate between "shall obtain" and "provide" transactions, as well as the varied conflicts that abound.

B. Conflict over Statutory Interpretation.

Supporting the plain statutory interpretation position are the following cases: *Freidco, Ltd. v. Farmers Bank*, 449 F. Supp. 995, 1000 (D. Del. 1980); *Amerifirst Properties Inc. v. FDIC*, 880 F.2d 821, 826 (5th Cir. 1989); *Swerdloff v. Miami National Bank*, 584 F.2d 54, 57 (5th Cir. 1978); *Costner v. Blount National Bank*, 578 F.2d 1192, 1194, 1196 (6th Cir. 1978); *Sharkey v. Security Bank & Trust Co.*, 651 F. Supp. 1231, 1239 (D.C. Minn. 1987); *JST Properties v. First National Bank of Glencoe*, 701 F. Supp. 1443,

1450-51 (D.C. Minn. 1988); *Nordic Bank PLC v. Trend Group, Ltd.*, 619 F. Supp. 542, 556 n. 9 (S.D.N.Y. 1985).

The following authority holds a claimant needs to show that the violation of the BHCA is anticompetitive in nature. *B.C. Recreational Industries v. The First National Bank of Boston*, 639 F.2d 828, 831 (1st Cir. 1981); *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 897 (3rd Cir.), cert. denied, 454 U.S. 893 (1981); *Duryea v. Third Northwestern Nat. Bank*, 606 F.2d 823, 825, (8th Cir. 1979); *Davis v. First National Bank of Westville*, 868 F.2d 206, 208 (7th Cir.), cert. denied, 110 S. Ct. 68 (1989); *Rae v. Union Bank*, 725 F.2d 478, 480 (9th Cir. 1984); *Bieber v. State Bank of Terry*, 928 F.2d 328 (9th Cir. 1990); *Palermo v. First National Bank & Trust Co. of Oklahoma City*, 894 F.2d 363, 369 (10th Cir. 1990); *Parson Steel, Inc. v. First Alabama Bank*, 679 F.2d 242, 244-45 (11th Cir. 1982). Within those circuits advocating an anti-competitive nature, there is a debate as to what the extent, if any, such a nature need be shown. This debate ranges from an act that is anti-competitive in nature to a requirement that an anti-competitive effect must be shown. For the former view see e.g., *Tose*, 648 F.2d at 897, *Duryea*, 606 F.2d at 825, *Palermo*, 894 F.2d at 368, and *Parson Steel* 679 F.2d at 246. For those courts adopting the anti-competitive effect argument, see e.g., *Rae v. Union Bank* 725 F.2d at 480 and Davis, 868 F.2d at 209. The primary difference between the "nature" and "effect" arguments, is that for "nature" a plaintiff must show a unlawful tying between the lender and its debtor [*Parson Steel* 679 F.2d at 246.], and for "effect" and debtor must show the lender's actions prevented competition between rival banks [*Davis*, 868 F.2d at 209].

C. Conflict over what is an Unusual Banking Practice.

In the case on petition, Farmers submitted evidence that Bank

again committed to provide funds to Farmers as had been its custom and practice. (A159-61). Bank agreed but later reneged. Id. Discovery below produced evidence that Bank had conspired with Farmers' manager Mr. Ambuehl; such as secret diversion of $10,000.00 to Ambuehl, another $1,200.00 payment by Bank to Ambuehl, a secret checking account opened with Bank by Ambuehl, and secret operation of Farmers' business predating the coerced May 8, 1985, takeover agreement. Id. After these covert acts occurred, Bank threatened Farmers with criminal prosecution for writing "bad" checks by withholding the funds. Id. Farmers were coerced into signing over their operations to Bank on May 8, 1985. Id. Interstate commerce was adversely affected. Infra p. 21.

In those circuits applying the plan language of the BHCA, the question of unusual banking practice is resolved if an additional consideration is extracted by the lender's economic leverage. E.g., *Amerifirst Properties, Inc. v. FDIC*, 830 F.2d 821, 824 (5th Cir. 1989).

Other lower courts advocate that the nontraditional banking practice element must accompany proof that the property or service benefited the lender. This is illustrated by those opinions that state what proof is lacking under the BHCA. For example, in *Tose v. First Pennsylvania Bank*, 648 F.2d at 897, the court stated "there is no evidence that Tose's ouster in favor of Barnes was made a 'condition or requirement of a loan to the Eagles or to Tose'; under these circumstances, '[it] was not a demand for a' service . . . other than those related to and usually provide in connection with a loan". In *B.C. Recreational Industries v. First Nat'l of Boston*, 639 F.2d at 832, the court found that defendant's replacing manager had no financial connection with Bank. In *Parson Steel, Inc. v. First Alabama Bank of Montgomery*, 679 F.2d at 246, the

court held that the plaintiff (after a jury trial) failed to establish facts from which the existence of a tying arrangement benefiting the bank could reasonably be inferred. Such proof exists in Farmers' case, supporting a jury trial and defeating summary judgment.

The Seventh Circuit in *Mid-State Fertilizer v. Exchange National Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989) analyzed whether the acts therein were nontraditional banking practices under the concept of the anti-competitive effects approach and found no claim.

Farmers presented testimony from two of Bank's employees who testified that certain acts, committed against Farmers, were unusual. (A70, 71 & 79). Mr. Hillyer, Farmers' banking expert, after reading this testimony and reviewing other evidence, agrees that Bank committed several nontraditional banking acts against Farmers. (A65). Bank and Mr. Ambuehl had a financial connection as shown by the Country Fresh Produce transactions. (A116). Evidence of the anti-competitive nature and effects on interstate commerce was also submitted. Infra p. 21.

Thus, this case presents a good factual basis in which to apply the law and resolve the conflict.

I. THE QUESTION OF THE PROPER INTERPRETATION OF THE BHCA IS AN IMPORTANT ONE AND PRESENTS A CASE OF FIRST IMPRESSION TO THIS COURT SINCE THE 1970 AMENDMENTS TO THIS ACT.

Customers protected under the BHCA need direction from this Court as to what constitutes a violation. The 1970 amendments to this act were intended to protect customers from wrongful lenders. With lenders being accused and convicted of civil and

criminal violations by the Department of Justice, private citizens need clear guidance on how they may pursue those lenders who violate this law. The current problem in the country known as the "savings and loans crisis" would also be aided by this Court's review. Federal thrift institutions are governed by a sister statute with the same statutory language. See, the Thrift Institutions Restructuring Act (TIRA), 12 U.S.C.S. § 1464(q)(1) (1982).[9] Congress intended these thrift institutions to be governed by the same statutory restrictions as banks and their holding companies. S. Rep. No. 536 at 17, reprinted in 1982 U.S. Code Cong. & Admin. News 3071.

Congressional laws regulating lenders is an important reason to grant the writ of certiorari. *United States v. Ruzicko*, 329 U.S. 287 (1946). Cases presenting important, first impression issues of statutory interpretation have been accepted for certiorari. Supreme Court Rule 10.1(c); E.g., *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) [certiorari accepted where case presents a first question regarding the Labor Management Reporting & Disclosure Act of 1959, Section 101(a)(3)].

Direction from this Court will allow all concerned to be more cognizant of their respective rights and duties.

A. Federal Estoppel Defenses.

This case also presents an issue of first impression of whether a state court may preclude upon estoppel principles or collaterally attack on due process grounds a final order of the United States Bankruptcy Court. Cases arising under either the BHCA or TIRA

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[9] For case law see *Bruce v. First Federal Savings & Loan Ass'n of Conroe, Inc.*, 837 F.2d 712, 717 (5th Cir. 1988); *Tri Crown, Inc. v. American Federal Savings & Loan Association*, 908 F.2d 578, 585 (10th Cir. 1990) [held as violative, the thrift's requirment of its customer to assume or purchase loans of another borrower].

often and will likely continue to result from situations involving severe financial distress and bankruptcy. E.g., *Swerdloff v. Miami National Bank*, 584 F.2d at 57.

After two months of contemplation, the bankruptcy court, under 11 U.S.C.S. § 554, abandoned (meaning conveyed) the estate's right to sue Bank for prebankruptcy wrongs to Farmers on May 12, 1986. (A46-47, 162). The state court precluded Farmers from going forward with their prebankruptcy claims. (A29-30). The state trial court invalidated a final order of the United States Bankruptcy Court on due process grounds and the allegedly insufficient disclosure by Farmers to the bankruptcy court. (A26-28). The interim bankruptcy trustee has never made such a claim and, after reading Farmers' state court complaint and conferring with his superior, the United States Trustee, will not make any such allegation. (A162-163). Moreover, the Chief Bankruptcy Judge, Robert J. Kressel, closed the estate on November 28, 1989, (A41) a year and a half after this lawsuit commenced. Under 11 U.S.C.S. § 350 the abandonment is final.

The trial and appellate courts applied federal common law developed under the Chapter 11 case of *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 416 (3rd. Cir.), cert. denied, 488 U.S. 967, (1988) to preclude Farmers' action on estoppel principles. Error is assigned because the United States Bankruptcy Court approved with finality both the disclosure and the conveyance, after reviewing the pleadings in this suit on petition. (A41). A conflict exists since two reported Chapter 7 cases dealing with estoppel, refused to preclude the claims. In *D-1 Enterprises v. Commercial State Bank*, 864 F.2d 36, 39 (5th Cir. 1989), the court refused to preclude the claims since Chapter 7 debtors are not required to raise these claims as a compulsory counterclaim or affirmative defense. Farmers were not required to raise these

claims in any prior proceeding below. Bankr. R. 7013. In *Sports Page, Inc. v. First Union Management, Inc.*, 438 N.W.2d 428 (Minn. App. 1989), the court in a Chapter 7 case did not apply judicial estoppel where the debtor had actually sued the therein defendant prior to filing the bankruptcy petition and failed to list such claim on the schedules. The prior (alleged) misrepresentation was provable by certified copies of court records. Disclosure was made to the trustee of the then known facts and the *Sports Page* plaintiff received an abandonment. Estoppel was not applied, the trustee made his decision based on the then known facts. 438 N.W.2d at 431-32.

The state court's collateral attack of a final order from the United States Bankruptcy Court should further compel this Court to grant the writ.

II. THIS COURT'S PRECEDENT ON HOW TO INTERPRET A FEDERAL STATUTE CONFLICTS WITH THOSE LOWER COURTS THAT READ "ANTI-COMPETITIVE" INTO §§ 106(b)(1) or (3) OF THE BANK HOLDING COMPANY ACT AMENDMENTS OF 1970.

"We have repeatedly recognized that '[w]hen . . . the terms of a statute [are] unambiguous, judicial inquiry is complete, except in "rare and exceptional circumstances."'" *United States v. James*, 478 U.S. 597, 608 (1986) (citing *Rubin v. United States*, 449 U.S. 424, 430 (1981)). In the absence of a clearly expressed legislative intention to the contrary, the language if the statute itself must ordinarily be regarded as conclusive. *James*, supra, (citing, *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Those courts that applied the ordinary meaning of the BHCA

comply with statutory construction precedent from this Court. E.g., *Costner v. Blount National Bank*, 578 F.2d at 1196.

Those courts, such as the Minnesota Court of Appeals below, that read an anti-competitive requirement into these subsections of the BHCA, bypass and conflict with the plain language precedent. (A11); E.g., *Davis v. First National Bank of Westville*, 868 F.2d 206, 208 (7th Cir. 1989). These courts also adopt the concept of "tying" the same as under the Sherman Act. Neither the terms of tying or anti-competitive are used within the BHCA statute.

Where the terms are not specifically defined in the statute, this Court refers to the ordinary meaning, for it is assumed that Congress' purpose was expressed by the ordinary meaning of the statutory language. *United States v. Locke*, 471 U.S. 84, 95-96 (1985). Those courts reading the term "anti-competitive" into the BHCA, conflict with this Court's clear teaching on how to interpret a statute.

Legislative history is only necessary when a term cannot be readily defined by a plain reading. For example, in *H. J. v. Northwestern Bell Co.*, 492 U.S. 229 (1989) this Court first applied the statute as written. Then, on the interpretation of the term "pattern", it cited the legislative history to find out how it was intended to be used. Id. 492 U.S. at 239; citing *Sedima S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 496 (1985).

With the absence of the terms "tying and "anti-competitive" from §§ 106(1)(a) & (c) of the BHCA (1970), the lower courts erred in their interpretation. Such error will continue without direction from this Court.

III. CERTIORARI SHOULD BE GRANTED BECAUSE A CONFLICT EXISTS NOT ONLY AMONG THE CIRCUITS BUT STATE COURTS AND THE CIRCUITS REGARDING THE INTERPRETATIONS OF VIOLATIVE ACTS UNDER THE BHCA, THE CONSEQUENCES OF WHICH ARE UNEQUAL TREATMENT OF BHCA PLAINTIFFS.

The divergence below could not be more polarized in result. Those authorities applying the plain language interpretation, protect debtors from lenders who extract additional consideration from them. (Supra p. 13). Other courts require the additional proof of an unusual banking practice. (Supra p. 15). In those jurisdictions advocating the tying or anticompetitive nature, debtors have the additional burden of establishing that the bank's demand is, by its natural consequences, anticompetitive. (Supra p. 14). In those circuits advocating a showing of an anti-competitive effect, debtors need to make the strigent proof that the bank's activity, prevented competition between banking rivals. (Id).

Farmers submit evidence that Bank forced them to obtain the exclusive managerial services of Country Fresh Product (Mr. Ambuehl) and $10,000 of their money to Mr. Ambuehl. (A82-83). Bank, based on such deceiption, forced Farmers to provide their legal committment of underwrite a loan distributed to Country Fresh Produce. (A108). These wrongful acts had an anti-competitive effect on close to 100 of Farmers' actual and expectant contracts affecting interstate commerce. (A71-73, 97-100, 116, 120, 131-135). The loss to the community, based on Bank's March, 1985 financial analyses of Farmers' businesses, has been calculated to exceed $18,000,000. (A120). With this evidence, Farmers present a good factual basis for this Court to apply the law and resolve the conflict.

Granting of the Writ herein will bring into focus what proof is needed to survive summary judgment for the entire nation.

IV. THE STATE COURT APPLICATION OF FEDERAL SUMMARY JUDGMENT PRINCIPLES DIRECTLY CONFLICTS WITH PRECEDENT FROM THIS COURT BY INVERTING THE LIGHT UNDER WHICH EVIDENCE MUST BE VIEWED FOR CLAIMS AND DEFENSES.

This case comes on petition on Bank's second motion for judgment, granted and affirmed by the trial and appellate courts. Farmers won the first motion on appeal Radloff I, 455 N.W.2d. 490 (Minn. App. 1990). The factual record in Radloff I, have not been cited, acknowledged, or distinguished in the case now on petition (Radloff II). In Radloff II, the new trial judge [to the limited extent Farmers' evidence was addressed] inferred, implied, and insinuated every possible factual dispute in favor of the moving party (Bank) on summary judgment. For example, the trial judge conclusively found, without a citation to the record that Farmers' "representations . . . were false and they knew it"; (A28) and said that Farmers' banking expert's affidavit (only citing one of two) "is a little more that plaintiffs' own version of the events or theory of liability dressed up and sanctified as an expert." (A38).[10] The appeals court affirmed and applied the same erroneous, unbelieving view of Farmers' evidence. In particular, the appeals court held that the difference in acreage, 35 acres of crops injured versus 25 acres leased, was "too technical" or "too

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[10] We ask this Court to take judicial notice that when an expert testifies to support causation, such person would naturally agree that harm occurred as a result of the victims' claimed incident.

metaphysical." (A10).

The record contains, among other things, the pilot's affidavit that 35 acres were sprayed and the horticulturalist testified that all 35 acres were rendered commercially worthless. (A45). And, Mr. Radloff's scaled map showed their location. (A87). Both lower courts cited but erred in adopting this Court's precedent governing summary judgments.

A. This Court's Precedent.

Under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), this Court applying past precedent held that "the determination of whether a given factual dispute requires submission to a jury must be guided by substantive evidentiary standards that apply to the case." Credibility determinations, the weighing of the evidence, and the drawing of legitimate interferences from the facts are jury functions, not those a judge, whether he is ruling on a motion for summary judgment or directed verdict. The evidence of the non-movant is to be believed, and all justificable inferences are to be drawn in his favor. Id, 477 U.S. at 249, 255.

The lower courts' credibility determinations without citations to the record, the selection of what material evidence will be discussed, and the passivity as to the most ardent evidence, shows that this case presents clear error. This Court should reaffirm, to prevent abuses to litigants' right to due process, that credibility determination is the exclusive providence of the trier of fact. The lower courts inverted the credibility determinations by disbelieving the affidavits, deposition testimony, and admissible documents all supporting Farmers' factual citations and legal theories.

B. The Violations of the Bank Company Holding Act.

After this case commenced, it became apparent that there was indeed a conspiracy between the Bank and the Farmers' former hired manager, Mr. Ambuchl, existing prior to an agreement dated

May 8, 1985, in which the Bank took over operation of Farmers' assets. There are at least two checks of record that show that Mr. Ambuehl received approximately $11,200.00 prior to the execution of the May 8, 1985, agreement.[11] (A116, 117). Bank used its custom of dealing with Farmers to force them to rely upon the unwritten line of credit arrangement. Farmers requested and Bank orally agreed, as had been its custom, to advance Farmers money. Farmers relied and Bank knew it. When Farmers' checks were presented, Bank refused to negotiate them unless the May 8, 1985, agreement was signed. Bank's acts harmed Farmers and Interstate Commerce. Supra. p. 21. There are several notes in the file, in the bank officer's own handwriting and typewritten, that show the Bank had planned for several months prior to May 1985 to force the Farmers into bankruptcy. [First trial appendix exhibits G8-G13].

A majority of these facts were not known to the Farmers until this lawsuit commenced on or about June 3, 1988.

C. The Trespass, Tortious Interference and Restraint of Trade.

In its simplest form, the violations of state law break down into the issue of whether the number of acres destroyed (35) exceeded Bank's 25-acre lease. The lower court erred by not recognizing that Bank never had an interest in 10 acres of Farmers' crops and land. The pilot stated, in an exhibit attached to his affidavit, that he destroyed 35 acres of asparagus crops pursuant to instructions by the Bank. (A42). The Bank's lease was expressly limited to 25 acres. (A57). Farmers had the right to lease all of the land, commencing on May 7, 1986, effective April 1, 1986.

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[11]Where there is direct evidence of a conspiracy, it is proper to deny summary judgment. *Chevron Corp. v. Arizona*, 906 P.2d 432, cert. denied, June 3, 1991.

(A54). Bank's agreement to purchase these crops was expressly limited by their own writing to whatever crops they actually removed on their 25-acre lease by May 15, 1986. (A56). Once the 25-acre lease expired, Farmers had a claim to the entire 35 acres because the Bank never removed the crops. Though Mr. Ambuehl threatened Mr. Radloff, Bank received an extension to their previously expired 25-acre lease and then paid Ambuehl $9,215.00. (A106, 117). On the last day of this coercively extended lease, Bank chemically attacked Farmers' crops and land. (A42, 45). The property was rendered commercially worthless. (A45).

Had the asparagus been crude petroleum still in the ground, perhaps the issue would be easier to understand. If an oil company has rights to drill for the oil but loses (or is about to lose) its partial land lease rights and, as they are leaving, sets the field on fire, the landowner would certainly have a claim on several counts. This, by analogy is what happened here between Farmers and Bank.

The record contains more facts to support the claims.

D. Unclean Hands Preventing Estoppel.

In the trial court's grant of summary judgment, it said that the Farmers' "representations . . . were false, and they knew it." (A28). No evidence from the record is cited. The trial court reasoned that because the Farmers are claiming, after discovery of the facts, damages of $1,600,000.00 as opposed to the $100.00 they paid for the abandonment, that somehow it proves that they had knowledge of the value of their claims prior to the request of the abandonment. The trial court goes on to say that the Farmers' motive was that they wanted to receive a "windfall." (A29). The windfall argument is in reliance upon Bank's misrepresentation that they have no right to an offset. The Farmers from the first

complaint in this matter and every subsequent filing, have acknowledged the Bank's right to offset. (A168-169). Beyond Farmers' acknowledgment of the Bank's right of offset, the Bank has in fact recouped during the pendency of this litigation approximately $360,000.00. (A74, 151).

Second, the fact that the trial court dismissed Farmers' claims shows that in the trial court's mind, the claims are worthless. Thus the trial court's own argument falls on its face, because to accuse the Farmers of making a misrepresentation as to the value of claims and then to say they have no claims, is an unresolvable hypocrisy. The Farmers did not initially sue the Bank under the Bank Holding Company Act claim. Only after discovery showed that the Bank Holding Company Act claim was viable, because of the conspiracies between the Bank and Mr. Ambuehl, did the Farmers move and were granted leave to amend their complaint. (Supra p.6). Farmers did not conceal their potential Bank Holding Company Act claim, nor did they know of its value was anything but speculative. (A162-163).

The claimed violations of the BHCA, among other wrongs, should be sufficient evidence of Bank's unclean hands or bad faith to preclude their estoppel defenses. (A151-152).

The state court's inversion of the credibility inferences is in conflict with the relied upon summary judgment precedents from this Court and impinges upon Farmers' constitutional right to due process of law.

We petition this Court to grant certiorari to reinstate the traditional and constitutional functions of the jury and due process.

CONCLUSION

Farmers present a case of first impression, where a sufficient number of lower courts have addressed the applicable statute, where a great chasm of interpretation confuses the intent of the BHCA, so as should require this Court to issue a Writ of Certiorari to review the judgment and opinion of the Minnesota Court of Appeals.

Respectfully Submitted:

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STATE OF MINNESOTA
IN SUPREME COURT
C5-90-1792

OFFICE OF
APPELLATE COURTS
APR 18 1991
FILED

Steven I. and Barbara Radloff,

Appellants,

vs.

First American National Bank
of St. Cloud, N.A., et al.,

Respondents.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that Steven I. and Barbara Radloff's motion for reconsideration of the denial of their petition for further review be, and the same is, denied.

Dated: April 18, 1991

BY THE COURT:

s/ A.M. Keith
Chief Justice

STATE OF MINNESOTA
IN SUPREME COURT

Steven I. Radloff and Barbara Radloff,
Petitioners,
vs.
First American National Bank of St. Cloud, N.A.; and First Farm Corporation, Inc. of St. Cloud, a Minnesota Corporation,
Respondents.

PETITION FOR REHEARING

APPELLATE COURT CASE NO.: C5-90-1792

DATE OF FILING OF THIS COURT'S DENIAL OF REVIEW: MARCH 27, 1991

Petitioners Steven and Barbara Radloff (hereinafter "Farmers") respectfully request this Court to reconsider its denial of March 27, 1991, under Rule 140.01 and to grant review. Farmers specifically incorporate herein all matters of record

. . .

Dated: April 4, 1991

s/ Michael A. Pinotti
Michael A. Pinotti
Attorney for Petitioners

STATE OF MINNESOTA
IN SUPREME COURT
C5-90-1792

OFFICE OF
APPELLATE COURTS
MAR 27 1991
FILED

Steven I. and Barbara Radloff,

Appellants,

vs.

First American National Bank
of St. Cloud, N.A., et al.,

Respondents.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Steven I. and Barbara Radloff for further review be, and the same is, denied.

Dated: March 27, 1991

BY THE COURT:

s/ A.M. Keith
Chief Justice

STATE OF MINNESOTA

☐ Supreme Court
☒ Court of Appeals

Steven I. Radloff, et al.,
Appellants,

vs.

First American National Bank of St. Cloud, N.A., et al.,
Respondents.

JUDGMENT

C5-90-1792
Appellate Court Case Number

C388455
Trial Court Case Number

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to wit, of the District Court within and for the County of Morrison be and the same hereby is affirmed and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT 4-24-91
Dated

Attest: Frederick K. Grittner
Clerk of the Appellate Courts

By: K. Erdmann
Assistant Clerk

STATE OF MINNESOTA

☐ Supreme Court

☒ Court of Appeals

TRANSCRIPT OF JUDGMENT

I, Frederick K. Grittner, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,

in the City of St. Paul 4-24-91
Dated

Frederick K. Grittner
Clerk of the Appellate Court

By: K. Erdmann
Assistant Clerk

This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (1990)

STATE OF MINNESOTA
IN COURT OF APPEALS
C5-90-1792

Morrison County — Lansing, Judge

Steven I. Radloff, et al.,

Appellants,

Michael A. Pinotti
Suite 830 Rosedale Towers
1700 West Highway 36
Roseville, MN 55113

John E. Thomas
24 East Fourth Street
St. Paul, MN 55101-1099

vs.

First American National Bank of St. Cloud, N.A., et al.,

Respondents.

Kevin J. Hughes
Jean M. Didier
Hughes, Thoreen, Mathews & Knapp
Suite 200, 110 So. Sixth Avenue
Post Office Box 1187
St. Cloud, MN 56302-1187

Filed: February 5, 1991
Office of Appellate Courts

Considered and decided by Lansing, Presiding Judge, Parker, Judge, and Foley, Judge.

UNPUBLISHED OPINION

LANSING, Judge

Steven and Barbara Radloff appeal a summary judgment dismissing nine separate claims arising from a lending arrangement with their bank. We affirm.

FACTS

Steven and Barbara Radloff allege damages for acts of the First American National Bank of St. Cloud during a ten-year lending arrangement and at its conclusion in the 1985 bankruptcy of the Radloffs' farming operation. The allegations are based on three clusters of events. The first occurred in 1985 when the bank conditioned a collateral protection loan on the Radloffs' agreement that James Ambuehl would manage the produce operation.

The second relates to the bank's postbankruptcy acquisition of 25 to 35 acres of the Radloffs' asparagus crowns.[1] The bank acquired the crop through both purchase at auction and purchase by Royalton Acres, an entity in which the bank was a partner. The bank also leased from the bankruptcy trustee, from March 15, 1986 through May 15, 1986, 25 acres on which the asparagus crowns were growing. The bank obtained an extension of the lease through May 28, 1986 from the Radloffs, who had acquired a lease from the trustee for the same land for the period April 1, 1986 to March 1, 1987. During the lease, the bank harvested part of the

[1]Asparagus crowns are roots grown from seeds in densely planted beds which are later transplanted to permanent production beds.

asparagus crown crop growing on the property, and on May 27, 1986 sprayed 25 to 35 acres of the remaining crowns with "Round-Up," a fast-action herbicide.

The final cluster of events occurred during the mortgage redemption period. The bank purchased that part of the bankruptcy estate known as the "Holthaus Farm" property. Both the bank and the Radloffs submitted bids. The Radloffs' bid was higher, but the trustee accepted the bank's offer because it had available cash to close the sale.

We address the nine separate causes of action individually.

DECISION

I. Individual Causes of Action

(1) Fraud

The Radloffs claim four false representations by the bank: (1) that during Ambuehl's management of the produce operation, the mortgagee would be paid only out of future crop proceeds; (2) that during the same period, the bank would advance funds to the Radloffs for harvesting expenses; (3) that the new entity created during Ambuehl's management, Country Fresh Produce, would be for the Radloff's benefit; (4) and that prior to the pesticide spraying, the bank would harvest "some," but not "all" of the asparagus crowns.

Misrepresentations must be based on "past or existing fact" and not "statements of intention or opinion." Dollar Travel Agency, Inc. v. Northwest Airlines, Inc., 354 N.W.2d 880, 883 (Minn. App. 1984). We agree with the trial court's analysis that the allegations are premised on opinions or intentions which do not constitute actionable misstatements of past or present fact.

(2) Duress

The Radloffs allege they were coerced by Ambuehl into agreeing to the conditions of the May 1985 loan agreement and into extending the bank's May 1986 lease of the 25 acres of asparagus crowns. In both negotiations, the Radloffs were represented by and consulted with an attorney. See St. Louis Park Inv. Co. v. R. L. Johnson Inv. Co., 411 N.W.2d 288, 291-92 (Minn. App.), pet. for rev. denied (Minn. Oct. 30, 1987). The Radloffs' opportunity to consult with an attorney and their failure to factually connect the bank to Ambuehl's alleged threats defeat this claim.

(3) Trespass and Outrage (Intentional Destruction of Property)

These claims arise from the bank's aerial spraying of 25 to 35 acres of asparagus crowns. The Radloffs assert that the bank's destruction of the crowns harmed the land and deprived them of a "reversionary interest" in any unharvested crop. We see no factual support for the claimed harm to the land or the reversionary interest.

The bank owned the asparagus crowns at the time of the spraying either by purchase at auction or by Royalton Acres' purchase of all crops located on nonexempt real property in the bankruptcy estate. The subsequent change in Minnesota law increasing homestead exemption acreage, Minn. Stat. § 510.02 (1986), does not undermine the bank's ownership because the law's application is not undermine the bank's ownership because the law's application is not retroactive. Minn. Stat. § 645.02 (1986). See also In re McKeag, 104 B.R. 160, 164 (Bankr. D. Minn. 1989) (debtor may not take advantage of changes in state exemption law effective after the date the petition for relief is filed).

The bank's ownership of the asparagus crowns also derived

from its right of possession under the lease agreement and its extension. The lease permitted removal of the crowns. In addition, a possessor of land at the time of harvest has superior ownership rights to the crops. Mulvihill v. Finseth, 396 N.W.2d 889, 891 (Minn. App. 1986), pet. for rev. denied (Minn. Jan. 27, 1987). Whether the bank was under an obligation to remove or preserve the asparagus crowns is not material because they were owned by the bank.

The only viable trespass claim would be for the bank's actions on property other than the 25 acres. Because the bank owned the crop, the trial court characterized this as, at best, a technical trespass. We agree. We also view the factual basis as insufficient to show that the spraying exceeded 25 acres or that such spraying caused any residual harm to the acreage. The Radloffs initially stated that 35 acres were affected but later stated that the crowns were not destroyed on five to seven acres. The acreage allegedly at issue is not sufficiently identified.

A properly supported motion for summary judgment requires the nonmoving party to present affirmative evidence to support its cause of action. Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1989) (citing Anderson v. Liberty Lobby, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514-15 (1986)). Affirmative evidence is more than creating "some metaphysical doubt as to the material fact." Id. at 715 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586, 106 S. Ct. 1348, 1355-56 (1986)). The factual basis for the claim of trespass and outrage is not sufficient to withstand summary judgment.

(4) Wrongful Repossession

The wrongful repossession allegation asserted as a violation of the Uniform Commercial Code, Minn. Stat. § 336.9-503 (1986), is similarly unsupported. The bank acquired the asparagus crowns by

purchase and by virtue of their possessory right to the land. The wrongful repossession claim is not factually grounded.

(5) Tortious Interference with Contract or Business Advantage

The Radloffs allege that the bank conspired to defeat their business relationships and to thwart their purchase of the Holthaus Farm property. Actionable interference with a contract requires a specific, existing contract. See Wild v. Rarig, 302 Minn. 419, 442-43 n.16, 234 N.W.2d 775, 790-91 n.16 (1975), cert. denied, 424 U.S. 902, reh'g denied, 425 U.S. 945 (1976). Wrongful interference with noncontractual business relationships requires intentional conduct affecting specific relationships. See Witte Transp. Co. v. Murphy Motor Freight Lines, Inc., 291 Minn. 461, 466, 193 N.W.2d 148, 151 (1971). The Radloffs fail to allege actions which would support a claim of intentional interference with specific contract or business relationships. Consequently, there is no genuine issue for trial.

(6) Bank Holding Company Act (Tying Arrangements), 12 U.S.C. § 1972 (1986)

The Radloffs claim that the bank's tying Ambuehl's management of the business to the extension of credit was not usual and customary banking practice. The purpose of section 1972 is to prohibit anticompetitive banking practices. See Dannhausen v. First Nat'l Bank of Sturgeon Bay, 538 F. Supp. 551, 563 (E.D. Wisc. 1982). No violation of the act occurs if the bank's practices are usual and customary. See Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 897 (3rd Cir.), cert. denied, 454 U.S. 893 (1981). Conditioning a collateral protection loan on continuing management by one individual is not an unusual or uncustomary act which diminishes competition and triggers the protection of the act.

(7) Restraint of Trade

Minn. Stat. § 325D.51 (1986) requires a "contract, combination, or conspiracy" to restrain trade. Section 325D.52 (1986) requires use of "monopoly power" to affect competition. Because there is no allegation, let alone proof, of an economic effect to anyone other than the participants in this transaction, a cause of action for restraint of trade cannot survive. See generally Minnesota v. Northern Securities Co., 194 U.S. 48, 24 S. Ct. 598 (1904).

(8) Breach of Fiduciary Duty

A bank's business transactions with a customer do not give rise to a fiduciary relationship unless there are special circumstances. See Klein v. First Edina Nat'l Bank, 293 Minn. 418, 422, 196 N.W.2d 619, 622-623 (1972). The Radloffs are experienced business persons not disposed to passively rely on the bank, and there has been no showing of special circumstances from which a fiduciary duty would arise.

II. Equitable and Judicial Estoppel

In addition to the specific reasons for the failure of each claim, the trial court found that the Radloffs were equitable and judicially estopped from asserting any of the prebankruptcy claims because of their failure to disclose potential claims against the bank at the time they sought abandonment by the bankruptcy trustee. See Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419-20 (3rd Cir.) (debtor equitably and judicially estopped from prosecuting claims against bank for failure to disclose claims during bankruptcy proceeding), cert. denied, 488 U.S. 967 (1988); Transamerica Ins. Group v. Paul, 267 N.W.2d 180, 182-83 (Minn. 1978) (equitable estoppel applied to bar party from denying representation falsely made in an application for a bond).

The application of estoppel is supported by the facts. The

Radloffs' reliance on Sports Page, Inc. v. First Union Management, Inc., 438 N.W.2d 428 (Minn. App. 1989) as authority against estoppel is incorrect because in Sports Page the claims were fully disclosed to the trustee prior to abandonment.

III. Punitive Damages and Judicial Notice

The failure of the separate causes of action eliminates consideration of the Radloffs' request to reverse the trial court's denial of their motion to plead punitive damages. The Radloffs' request that the trial court take judicial notice of Ambuehl's 1970 felony conviction was withdrawn by their attorney at the summary judgment hearing. Even if judicial notice had been extended, it would not affect our determination on the various causes of action.

Affirmed.

s/ Harriet Lansing

January 28, 1991

CERTIFIED COPY

I hereby certify that the within is a full, true and complete copy of the original document as filed and remaining in the office of the Court Administrator.
WITNESS my hand and seal of said Court hereto affixed at Little Falls, MN.
Date July 24, 1990
Signed Linda Sinotte
Court Administrator
By Shari Bucholz
Deputy

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF MORRISON SEVENTH JUDICIAL DISTRICT

Steven I. Radloff and Barbara Radloff,

Plaintiffs,

vs.

First American National Bank of St. Cloud, N.A.; and First Farm Corporation, Inc. of St. Cloud, a Minnesota Corporation,

Defendants.

ORDER AND MEMORANDUM

Court File No. C3-88-455

The above-entitled matter came on for hearing the 11th day of July 1990, at the Courthouse in the City of Little Falls. Plaintiffs were represented by their attorneys, Michael A. Pinotti and John Thomas. Defendants were represented by their attorneys, Kevin J. Hughes and Jean M. Didier.

Having heard and considered the argument of counsel, having

reviewed and considered the documents that were filed in support of or in opposition to the motion, being fully advised in the premises, and on all the files, records and proceedings herein, the Court now makes the following:

ORDER

1. All claims asserted by plaintiffs in the Complaints which have been filed, except those noted in part B, section 2 of this memorandum were withdrawn and are accordingly dismissed with prejudice.

2. Defendants' motion for summary judgment is granted.

3. Plaintiffs' motion for leave to file an Amended Complaint alleging punitive damages on certain counts is denied.

4. Plaintiffs' motion seeking reconsideration of the Court's ruling on the judicial notice question was withdrawn for presentation at a later time by Mr. Pinotti and thus does not require a decision at this time.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 19th day of July, 1990.

/s/ Timothy J. Baland
TIMOTHY J. BALAND
Judge of District Court

JUDGMENT

Pursuant to the foregoing Order, judgment is hereby entered accordingly.

Dated this 19th day
of June, 1990.

/s/ Linda Sinotte
Court Administrator

MEMORANDUM

I. THE CURRENT STATE OF THE LAW ON SUMMARY JUDGMENT MOTIONS.

A. Rule 56.

Summary judgment may be granted when there is "no genuine issue as to any material fact." Rule 56.03, Minn.R.Civ.P. Under Rule 56.05, affidavits must "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." When a motion for summary judgment is properly made and supported, "an adverse party may not rest upon the mere averments or denials of the adverse party's pleadings but must present specific facts showing that there is a genuine issue for trial." Rule 56.05, Minn.R.Civ.P.

B. Burden of Proof

The leading case on the question of the burden of proof in a summary judgment action is Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986). In the Liberty Lobby decision, the U.S. Supreme Court ruled that the burden of proof for a party moving for summary judgment "is the same as that party would have at trial . . ." 2A Minnesota Practice, 1989 Pocket Part, Sec. 56.19, p. 23.

Specifically, the Court in Liberty Lobby wrote:

> [I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not. Whether a jury could reasonably find for either party,

however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant. It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

106 S.Ct. at 2513. The Court went on:

> In sum, we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages.

Id., at 2514. Ultimately,

> . . . the burden on the moving party may be discharged by "showing" -- that is, pointing out to the district court -- that there is an absence of evidence to support the non-moving party's case.

Celotex Corp. v. Catrett, 106 S.Ct. 2548 at 2554 (1986).

The Supreme Court's analysis of the burden of proof question in summary judgment motions can perhaps best be understood in light of a law review article by Professor James R. Pielemeier. The article, Summary Judgment in Minnesota: A Search for Patterns, 7 Wm. Mitchell L. Rev. 147 (1981) provides a useful analytic framework in which to consider any summary judgment motion. Summary judgment motions can be divided into four categories, four "paradigm situations." The four paradigms are as follows:

1. Motion by defendant seeking to negate an essential element of the plaintiff's claim.

2. Motion by plaintiff seeking to negate the affirmative defenses alleged by defendant when the basic allegations underlying plaintiff's claim are admitted.
3. Motion by defendant seeking to establish conclusively the existence of a valid affirmative defense.
4. Motion by plaintiff seeking to establish conclusively the existence of a claim.

7 Wm. Mitchell L. Rev. 147. As Professor Pielemeier notes, summary judgment should logically be somewhat easier to obtain in paradigms one or two, because in those instances the moving party "seeks to negate the existence of a fact essential to the other part's case, a fact for which the other party has the ultimate burden of proof" at trial. Id.

C. Credibility, Inferences.

The Liberty Lobby opinion restates existing case law on the way in which the trail court is to resolve questions of credibility or deal with factual inferences.

> Our holding does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial court should act other than with caution on granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be

to proceed to a full trial.

Liberty Lobby, 106 S.Ct. at 2513, citations omitted. The Liberty Lobby holding in this respect is consistent with existing Minnesota Case law. See, for example, Rathbun v. W. T. Grant, 300 Minn. 223, 219 N.W.2d 641, (1974); Nord v. Herreid, 305 N.W.2d 337 (Minn. 1981). However, "a simple assertion that an affiant's statements may be disbelieved . . . is insufficient to defeat a motion for summary judgment. The opponent of the motion must demonstrate some basis for an attack on the affiant's credibility . . ." 2A Minnesota Practice, 1989 Pocket Part, Sec. 56.20, p. 23. There must be a positive showing that the testimony could be impeached or that other contrary evidence exists. Bixler v. J.C. Penney Co. Inc., 376 N.W.2d 209 (Minn. 1985), appeal after remand, 405 N.W.2d 428 (1987).

D. The Function of the Trial Court on a Summary Judgment Motion.

The Court's function on a summary judgment motion is to determine whether or not a genuine issue of material fact exists "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Liberty Lobby, 106 S.Ct. at 2511.

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Id., at 2505.

E. Materiality; What Constitutes a "Genuine" Dispute?

The mere existence of a factual dispute does not, by itself, make summary judgment improper. The facts in dispute must be

"material." Pischke v. Kellen, 384 N.W.2d 201 (Minn. App. 1986). A material fact is one that will affect the result or outcome of the case. Zappa v. Fahey, 310 Minn. 555, 245 N.W.2d 258 (1976); Pischke, supra at 205. As was noted by the U.S. Supreme Court in the Liberty Lobby decision,

> [T]he substantive law ill identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

106 S.Ct. at 2510.

Similarly, the dispute about a material fact must be genuine."

> [S]ummary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party.

Liberty Lobby, supra, at 2510. For the dispute to be genuine,

> [A]ll that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

Id., quoting from First National Bank of Arizona v. Cities Service Co., 88 S.Ct. 1575 at 1592 (1968). But "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party."

Liberty Lobby, 106 S.Ct. at 2511. "If the evidence is merely colorable, . . . or is not significantly probative . . . summary judgment may be granted." Id.

The party opposing the summary judgment motion "must do more than simply show that there is some metaphysical doubt as

to the material facts." Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 106 S.Ct. 1348, 1356 (1986). "Where the record taken as a whole could not lead a rational finder of fact to find for the non-moving party, there is no genuine issue for trial." Id., quoting from Cities Service, supra, at 1592.

F. Relationship Between Summary Judgment and Directed Verdict.

The majority opinion in Matsushita stated that the standard for deciding a motion for summary judgment is the same as for deciding a motion for a directed verdict. That pronouncement was expanded upon and clarified in the Liberty Lobby decision.

> The Court has said that summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party." And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Liberty Lobby, supra, at 2512, citations omitted. The court went on:

> If the defendant in a run-of-the-mill civil case

> moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict -- "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party product it, upon whom the onus of proof is imposed."

Id. Citations again omitted.

The principles enunciated in the Matsushita, Liberty Lobby and Celotex decisions have recently been adopted and followed in Minnesota. See Carlisle v. City of Minneapolis, 437 N.W.2d 712 (Minn. App. 1989). As is noted in 2A Minnesota Practice, 1989 Pocket Part, Sec. 56.19, p. 23:

> [T]he Court of Appeals adopted the reasoning of the United States Supreme Court decisions, citing in particular Celotex and Matsushita. Thus, the decisions are now part of the law of the State of Minnesota, and trial courts should follow the Carlisle decision. Parties opposing summary judgment must be prepared to present sufficient evidence in opposition to the motion as would

support of a motion for directed verdict.

In Carlisle, the Court of Appeals observed:

> The summary judgment standard under the federal rules mirrors "the standard for a directed verdict under Fed.R.Civ.P. 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict."

Carlisle, supra, 437 N.W.2d at 715, quoting from Liberty Lobby, supra, at 2505.

From this brief review of Carlisle, Celotex, Liberty Lobby and Matsushita, we can see that the summary judgment holdings of cases like City of Coon Rapids v. Suburban Engineering, Inc., 167 N.W.2d 439 (Minn. 1969) or Sigler v. First American National Bank of St. Cloud, 325 N.W.2d 136 (Minn. 1982) no longer accurately reflect the true state of the law on summary judgment in Minnesota.

II. THE MERITS OF THE SUMMARY JUDGMENT MOTION IN THIS CASE.

A. Paradigm #1 and #3 Situation.

Defendants' summary judgment motion in this case presents a combined paradigm #1 and paradigm #3 situation, as described by Professor Pielemeier. See Part I, Section B of this Memorandum. Specifically, defendants seek here to negate elements in each of plaintiffs' theories of liability, and to establish conclusively the existence of one or more affirmative defenses. Plaintiffs will have the burden of proof with respect to their theories of liability at trial; defendants will have the burden of proof on their affirmative defenses at trial.

B. Claims Still Pending.

In their memo opposing defendants' summary judgment

motion, plaintiffs identify eight (or possibly nine) separate theories of liability on which claims for relief are still being asserted. Those theories include: fraud and duress; tortious interference with business contract or advantage; violations of the Bank Holding Act; restraint of trade; outrage (intentional destruction of property); trespass; breach of fiduciary duty or duty of good faith; and wrongful repossession. All other theories of liability previously asserted by plaintiffs have now been withdrawn. Those claims may appropriately be dismissed with prejudice.

C. Key Events and Facts.

The facts can be found in the documents which have been filed. Those facts which seem particularly important to me include the following:

(1) Mr. Radloff was a knowledgeable and experienced businessman.

(2) Mr. Radloff was either represented by or consulted with an attorney in connection with every critical development in the present controversy.

(3) Mr. Ambuehl was hired by the Radloffs in 1982 and came to be involved in the day-to-day operation and management of the business long before the parties entered into the May, 1985 agreement.

(4) The bank purchased the asparagus crowns on the 25 acre parcel after full compliance with bankruptcy court rules and applicable provisions of the Uniform Commercial Code.

(5) The Radloffs knew, or had reason to know, that their claims against the bank were of more than inconsequential value to the bankruptcy estate at the time they sought abandonment of those claims by the trustee.

(6) No disclosure of the claims against the bank, or of the effort to secure abandonment of those claims, was every made to

creditors or to the bank.

(7) The bank, by virtue of the bankruptcy charge, lost the right to use unpaid debt owed them by Radloffs as a potential offset against any civil verdict the Radloffs might obtain in state court on their claims.

As was noted in Carlisle, 437 N.W.2d 712 at 715, "[a] non-moving party must offer significant probative evidence tending to support [his] complaint." Here, as in Carlisle, the plaintiff "must present affirmative evidence in order to defeat" defendants' summary judgment motions. Id. With this standard in mind, we can turn to a discussion of the merits of defendants' motion.

D. Estoppel, Preclusion.

The concepts of equitable estoppel and judicial estoppel are related but not identical. Application of either doctrine serves to preclude a party from taking a position or carrying out some proposed course of action. The difference between equitable and judicial estoppel has been described by one court as follows:

> We are also mindful of the equitable concept of judicial estoppel. This doctrine, distinct from that of equitable estoppel, applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted. Judicial estoppel looks to the connection between the litigant and the judicial system while equitable estoppel focuses on the relationship between the parties to the prior litigation.

Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 416 (3d. Cir. 1988), citations omitted.

Oneida is instructive in several ways. The case involves claims by a debtor against a bank after bankruptcy proceedings. The claims arose out of the commercial transactions between the two

parties. Oneida claimed (as have Radloffs) that the bank committed fraud in connection with lending agreements or loan practices, that the bank wrongfully dishonored certain checks, that the bank's actions interfered with Oneida's business contracts and damaged its reputation, and that the bank wrongfully forced Oneida into bankruptcy. Oneida involves consideration and application of the doctrines of equitable and judicial estoppel on facts that are remarkably similar to those present here.

Oneida turns on a consideration of the adequacy of the disclosure that Oneida made to the bankruptcy court (and creditors) regarding its causes of action against United Jersey Bank. The critical need for and importance of such disclosure is discussed in Part II of the Oneida opinion (848 F.2d at 416-418). As the Court in Oneida observed:

> . . . [A] debtor must disclose any litigation likely to arise in a non-bankruptcy contest. Monroe County Oil Company v. Amoco Oil Co., 75 B.R. 158 (S.D. Ind. 1987). The result of a failure to disclose such claims triggers application of the doctrine of equitable estoppel, operating against a subsequent attempt to prosecute the actions. In Re Galerie Des Monnaies of Geneva Ltd., 55 B.R. 253 (Bankr. S.D.N.Y. 1985), aff'd, 62 B.R. 224 (Bankr. S.D.N.Y. 1986).

848 F.2d at 417. None of the claims now being asserted by the Radloffs were ever listed or scheduled by them anywhere in the papers they filed with the bankruptcy court, either in the Chapter 11 or the Chapter 7 proceedings. And yet, with the exception of those claims based upon events which occurred in late May of 1986, or the bidding on the Holthaus farm in 1987, all of plaintiffs' claims arise from and depend upon events which occurred

prior to June 20, 1985, the date Radloffs filed their Chapter 11 Petition. Moreover, in the spring of 1986, no effort was made by the Radloffs to disclose to the bank or any of the other creditors anything about the nature of the claims against the bank for which Radloffs sought and ultimately obtained abandonment by the U. S. Trustee.

The Radloffs failure to disclose their claims at that time is shocking. The Radloffs, through their bankruptcy attorney, represented to trustee Calvert that their claims against the bank, which had been under investigation for a number of months, were of "inconsequential value." Yet these same claims were then made the basis of the present lawsuit, commenced in June of 1988, in which damages of some $1,650,000 were sought. If the claims were worth 1.65 million to the Radloffs in June of 1988, they were worth more than $100 in May of 1986. Here, as in Oneida, "the license in the bankruptcy record concerning" Radloffs' claims "is deafening." 848 F.2d at 417.

At its core, the doctrine of equitable estoppel is designed to require cosnsistency of conduct by a party in circumstances where allowing inconsistency would cause substantial detriment to the party seeking application of the doctrine. See Evans v. Government Employees Insurance Co., 257 N.W.2d 689 (Minn. 1977). In Minnesota, application of the doctrine is proper only when certain circumstances exist. Consideration must be given both to the conduct of the party against whom the doctrine is sought to be applied, and with respect to the action, reliance and detriment of the party who seeks to invoke the doctrine. 28 Am. Jur. 2d, Estoppel and Waiver, §35, pp. 640-41. Five elements must be present before the doctrine can appropriately be applied. As identified in Transamerica Insurance Group v. Paul, 267 N.W.2d 180 (Minn. 1978), those elements are:

(1) There must be a misrepresentation of a material fact;
(2) The party to be estopped must be shown to have known that the representation was false;
(3) The party to be estopped must have intended that the representation be acted upon;
(4) The party asserting the estoppel must not have had knowledge of the true facts; and
(5) The party asserting the estoppel must have relied upon the misrepresentation to his detriment.

Transamerica, supra at 183.

The representations that Radloffs made to the trustee about the value of the claims that they sought to have abandoned were false, and they knew it. Alternatively, the evidence is conclusive to establish that plaintiffs were, at a minimum, negligent in connection with the total inadequacy of the disclosure that they made regarding their claims. The negligence was two-fold: the failure to list or schedule the claims in either bankruptcy proceeding, and the misstatement of value made when they sought to abandon the claims. As was noted in Alwes v. Hartford Life and Accident Insurance Co., "negligence takes the place of intent to deceive when there is a duty to disclose." 372 N.W.2d 376, 379 (Minn. App. 1985). The duty to disclose here is straightforward and unambiguous. See Oneida opinion, part II.

From the discussion thus far, we can see then that elements 1 and 2, as required by Transamerica, are present on these facts. It is also clear that the Radloffs intended that the trustee act on their representations about the value of their claims against the bank. Mr. Calvert took steps in reliance on the representations which led to an abandonment which he later found was unable to be reversed or set aside. Transamerica element 3 is met.

The bank had no knowledge of the request for abandonment.

Indeed, it does not appear that the bank was aware of the claims, much less the action taken by the trustee on the claims, until the bank was served with process in this action. Thus, element 4 under Transamerica is present.

As described in Transamerica, the 5th element has at least two component parts: reasonable reliance by the party seeking to apply the doctrine, and detriment or loss resulting from that reliance. The detriment to the bank is clear. Radloffs obtained the discharge of debts totaling $600,000 owed the bank as a result of their bankruptcy proceeding. The bankruptcy discharge prevents the bank from using that debt as a set-off against any verdict Radloffs might obtain on these claims. Put another way, because of the bankruptcy discharge, if Radloffs are allowed to proceed with their claims in this action, any verdict in their favor would involve a windfall recovery.

Prejudice and substantial detriment to the bank will occur here because of plaintiffs' conduct, because they obtained the trustee's abandonment until it was too late; plaintiffs prevented or made impossible by reliance by the bank on their representations about the value of their claims. As a direct consequence of the way in which the Radloffs went about things in bankruptcy court, the bank was deprived of an opportunity to be heard in a forum where its right of set-off was preserved or at least potentially available. Had plaintiffs proceeded in a way which resulted in notice to the bank of their request for abandonment, or made disclosure of the existence of the claims they sought to abandon, the bank would at the very least had a procedural due process opportunity to contest matters in bankruptcy court. Plaintiffs own conduct makes proof of the element of reasonable reliance unnecessary on the facts of this case. Elementary principles of fairness, as embodied in the doctrine of equitable estoppel, required dismissal of those claims

that had accrued prior to May 17, 1986.

I reach the same conclusion with respect to application of the doctrine of judicial estoppel. Here, as in Oneida, the facts compel a finding and conclusion that the Radloffs failure "to list its claim against the bank worked in opposition to preservation of the integrity of the system which the doctrine of judicial estoppel seeks to protect." 848 F.2d at 419. Here, as in Oneida, continued pursuit by Radloffs of their claims would violate "fundamental principles of preclusion." 848 F.2d 416.

Plaintiffs' reliance on the Sports Page case is misplaced. Sports Page, Inc. v. First Union Management, Inc., 438 N.W.2d 428 (Minn. App. 1989) is distinguishable, on at least two grounds. First, in Sports Page, the debtor sued in state court prior to the bankruptcy filing on the claim which was abandoned by the trustee and then pursued to verdict. Second, in Sports Page, the bankruptcy trustee had detailed, specific knowledge about the claims to review before making a decision on whether to abandon. Oneida controls. Summary judgment is appropriate on the doctrines of equitable and judicial estoppel.

E. Plaintiffs Various Theories of Liability.

Plaintiffs' claims are in part based upon events that occurred in May, 1986, or later on in 1987. These claims are not necessarily resolved by application of principles of estoppel or preclusion, as discussed in Section II. D. above. Also, to the extent that I am mistaken in relying on estoppel and preclusion to dismiss the pre-June 1985 claims, a discussion of each of plaintiffs' theories of liability is in order.

1. Fraud. The essential elements of fraud are listed in CIVIL JIG 610, found at 4 Minnesota Practice 406-07. To be actionable, the misrepresentation upon which a fraud complaint is based must "relate to past or existing fact and cannot be predicated on

statements of intention or opinion." Cady v. Bush, 166 N.W.2d 358, 361 (Minn. 1969); Dollar Travel Agency v. Northwest Airlines, 354 N.W.2d 880, 883 (Min. p. 1984). The fraud claims which are based upon events that occurred prior to plaintiffs' bankruptcy filing all involve "promises" or representations which either called for action in the future (promises to lend money or cover checks or pay certain creditors), or constituted expressions of opinion about future developments (the Country Fresh allegations). As such, these claims by definition, are not actionable in fraud. Kennedy v. Flo-Tronics, Inc., 143 N.W.2d 827, 832 (Minn. 1966); VanDeputte v. Soderholm, 216 N.W.2d 144 (Minn. 1974); Clements Auto Co. v. Service Bureau Corp., 289 F.Supp. 115, 12 (D.C. Minn. 1969), affirmed in part and reversed in part, 444F.2d 169 (8th Cir. 1971).

For a term beginning in March of 1986, the bank leased 25 acres from the Radloff bankruptcy trustee. That lease was entered into pursuant to a stipulation. The stipulation incorporated or was based upon a written offer made by the bank through counsel in November 1985. The letter containing the offer notes that the purpose of the lease was to provide the bank with a period of time in which to enter upon the 25 acres and "remove" the asparagus crowns. The lease was to expire on May 15, 1986.

By separate agreement with the trustee, but subsequent to the bank's lease, the Radloffs had leased the same 25 acre parcel. The bank was unaware of this agreement. When the bank still had people on the property after May 15, Mr. Radloff posted the property and complained. At this juncture, the bank had not yet removed all the crowns from the 25 acre parcel. Negotiations through counsel resulted in an agreement between the bank and Mr. Radloff for a 10 day extension of the bank's lease. The bank paid Mr. Radloff $2500 for the 10 day extension. (The original 60

day lease had been obtained from the trustee for only $600). It was during the 10 day extension that the bank caused the 25 acres to be sprayed with Roundup.

Plaintiffs allege that the bank concealed or misrepresented its intentions regarding the asparagus crowns when the bank secured the 10 day extension. The fact of the matter, however, is that the purpose of the original lease (and thus on the extension was well) was to permit the bank to remove the asparagus crowns. If that occurred, Mr. Radloff's subsequent possession of the property would not have involved any use by or benefit to him from the asparagus crowns. They were all to be "removed" in any event. In this context, we can see that whether the crowns were harvested, sprayed, or plowed under is really academic. The end result contemplated by the bank's lease was that no asparagus crowns would be left on the 25 acre parcel when that lease expired. That is exactly what happened.

I fail to see how these facts support a claim for fraud or misrepresentation. These facts are totally inconsistent with proof of necessary elements on such a theory of liability, including the nature of the representation, the requisite intent, the reasonableness of any reliance, and causation, not to mention damages. See 4 Minnesota Practice CIVIL JIG 610, Comment and Authorities, pp. 406-410.

Moreover, the bank owned the asparagus crowns. The bank obtained relief from the automatic bankruptcy stay and proceeded with an auction sale of secured, non-exempt property in September, 1985. The asparagus crowns on the 25 acre parcel were party of the bank's secured loan collateral, were listed for sale on the auction bills and were sold to the bank at the auction. By virtue of that sale, the bank owned the crowns, and could do with them what it wanted.

Plaintiffs' contention that the post-sale, state law change in the size of the homestead acreage exemption created some right or interest in the crowns on their part is mistaken. See In re Fingado, 113 B.R. 37 (D. N.M. 1990); In re Summers, 108 B.R. 200 (S.D. Ill. 1989); In re Kincaid, 90 B.R. 1014 (9th Cir. BAP (Or.)).

Key facts and circumstances that surrounded the bidding process that occurred in connection with the 1987 sale of the Holthaus farm are discussed at Section II. E. 6. of this memorandum. The Radloffs lost out in that bidding process largely because First Farm had ready cash with which to close on its offer. The facts fall short of providing a basis upon which to prove the requisite intent or the necessary reliance to sustain a claim of fraud. Causation is also problematical.

2. Duress. Duress has been defined as follows:

> Duress is coercion by means of physical force or unlawful threats, which destroys one's free will and compels compliance with the demands of the party exerting the coercion. Merely driving a hard bargain or wresting the advantage of another's financial difficulty is not duress. St. Louis Park Investment Co. v. R. L. Johnson Investment Co., Inc., 411 N.W.2d 288, 291 (Minn. App. 1987).

Plaintiffs allege that Mr. Ambuehl's May, 1986 phone call somehow wrongfully induced the May 1986 extension of the bank's lease of the 25 acres with the asparagus crowns. Attorney Kalenda represented the Radloffs in connection with those negotiations. That circumstance alone is enough to defeat this claim of duress. See St. Louis Park Investment Co., supra, at 291. The bank officer who negotiated the lease extension was unaware of the phone call or Radloffs' allegations about what Mr. Ambuehl was supposed to have said. Thus, there is no factual basis to link

the bank to Ambuehl with reference to this conversation, even if we accept plaintiffs' version about what was supposedly said. Plaintiffs have not met their burden to show that a fair-minded jury could return a verdict in their favor against the bank for duress as a result of anything said by Mr. Ambuehl in the May 1986 phone conversation. See Liberty Lobby, supra, at 2512.

Plaintiff's claims of duress with respect to the May, 1985 loan agreement suffer similar infirmities. Again, plaintiffs consulted with counsel before signing this agreement. Plaintiffs have failed to link the NSF check prosecution to any unlawful conduct by the bank, or show how that prosecution affected their decision to sign the May 8, 1985 loan agreement. I note that the bad check complaint was not issued until July 3, 1985 and that the complainant was Evergreen Equipment, Inc., a local John Deere dealer. The duress claims with respect to the May 8, 1985 loan agreement are fanciful and far-fetched.

3. Trespass. The aerial spraying took place on May 27, 1986. This was within the time covered by the extension of the bank's lease on the 25 acre parcel. There was no wrongful entry on the property. The technical trespass that occurred when bank employees or agents held over on the property past the original May 15 lease expiration date was effectively waived by Radloffs' acceptance of the $2500 in exchange for the 10 day extension of the original lease.

4. Outrage (intentional destruction of property). As can be seen from the discussion of Fraud at point 2 above, there is no factual basis on which plaintiffs can legitimately pursue this claim. The bank owned the crowns. The lease permitted their removal. Radloffs had no interest in the crowns that were removed or destroyed.

5. Wrongful Repossession. Plaintiffs' use of the term

"wrongful repossession" apparently refers to alleged violations of the provisions of the Uniform Commercial Code, as found in M.S. 336.9-503, 504 and 505. The instances of wrongful repossession, as alleged, are discussed at p. 11 of Mr. Pinotti's memo in opposition to defendants' summary judgment motion.

A claim of wrongful repossession presupposes that the property wrongfully repossessed was collateral for a loan. The first wrongful repossession claimed by plaintiffs involves disposition of certain funds. The money involved was not collateral; nothing was "repossessed" by the bank. The business records likewise were not collateral on any loan. The asparagus crowns were collateral on a loan, but they were not repossessed. As we have seen, the bank bought the crowns at an auction sale which occurred after the bank obtained relief from the automatic bankruptcy stay. The sale was advertised and conducted in a commercially reasonable manner. There is no basis for relief on plaintiffs' wrongful repossession claims.

6. Tortious Interference with Contract or Business Advantage. Plaintiffs refer to three episodes which give rise to their tortious interference claims. The facts relating to the spraying of the asparagus crowns have been discussed elsewhere in this memo and need no repetition here. Because the bank owned the crowns and, by lease, had the right of access to the property, no genuine issue of material fact exists with reference to a tortious interference claim based on the removal or destruction of the asparagus crowns.

One necessary element of a claim for tortious interference is either (a) the existence of an actual contract with a third party, or (b) existence of a prospective contractual relationship with another. 4 Minnesota Practice CIVIL JIG 680, 681, 1988 Pocket Part pp. 56-61. The interference, to be actionable, must refer to a specific existing or prospective contractual relationship. Knowledge is

essential. The interference must be intentional; the intent must have been to interfere with the specific existing or prospective contract. Guerdon Industries, Inc. v. Rose, 399 N.W.2d 186 (Minn. App. 1987). Recovery on a tortious interference claim also requires proof that the conduct either was not justified (contract), or that the conduct was "improper" (prospective relationship).

Plaintiffs' allegations about defendant First Farm's conduct in connection with the bidding that occurred in 1987 on the Holthaus farm are insufficient to defeat summary judgment. First Farm had a perfect right to bid on the Holthaus farm, and a legitimate, compelling reason to be interested in acquiring title to the property. There was nothing improper about First Farm's motive or conduct in the Holthaus farm bidding process. See Factors listed in Restatement (Second) of Torts, § 767, as discussed at P. 60 in the 1988 Pocket Part to CIVIL JIG 681.

The plaintiffs' third tortious interference claim relates to an alleged conspiracy between the bank and Mr. Ambuehl to take over plaintiffs' business in the spring of 1985. Plaintiffs' allegations on this count are insufficient to defeat summary judgment in at least two respects: first, there is no specific contract for which plaintiffs establish a prima facie case of intent to affect; second, the allegations really focus on the bank not performing its loan agreements or other "promises," not some intentional interference by the bank with a specific contract between Radloff and some third party. The allegations simply don't sound in the tort of tortious interference.

7. Bank Tying Act [12 U.S.C.§ 197.2 (1)]. Cases decided under the Bank Tying Act make it clear that no violation of the Act occurs so long as the measures taken by the bank and so long as the steps taken are usual and traditional banking practices, to protect the bank's investment in and security on the underlying

loan. The test for determining whether the measures taken involved "usual and customary banking practices" is whether the measure or step taken is "part of the business of banking." Continental Illinois Nat'l Bank and Trust Co. of Chicago v. Windham, 668 F.Supp. 375 (E.D. Tx. 1987); Tose v. First Pennsylvania Bank, 648 F.2d 879 (3rd Cir. 1981).

Quite a number of cases deal with the lender's insistence that the borrower accept a particular manager or financial advisor. Tose v. First Pennsylvania Bank, supra; Parsons Steel, Inc. v. First Alabama Bank of Montgomery, 679 F.2d 242 (11th Cir. 1982); B.C. Recreational Industries v. First National Bank of Boston, 639 F.2d 828 (1st Cir. 1981); Sterling Coal Co. v. United American Bank of Knoxville, 470 F.Supp 964 (E.D. Tenn. 1979). The use of managers or financial advisors in these cases arose under circumstances comparable to those which lead to the bank's insistence on Mr. Ambuehl's involvement in Mr. Radloff's operations. No violation of the Bank Tying Act was found in Tose, Parsons Steel, B.C. Recreational or Sterling Coal. In light of those cases, there is no basis to proceed to trial here on the Bank Tying Act claims.

I note in passing that plaintiffs' reliance on Swerdloff v. Miami National Bank, 584 F.2d 54 (5th Cir. 1978) is misplaced. In Swerdloff, the bank required transfer of 51% of the corporate stock to one of bank's preferred customers, which Swerdloffs then refused to do, with the resulting litigation that reached the Fifth U.S. Circuit Court of Appeals. We have facts vastly dissimilar to those in Swerdloff.

Plaintiffs' expert, Mr. Hillyer, fails to save the day. His brief affidavit does not state that the May 1985 Loan Agreement, which contains the provision regarding Mr. Ambuehl's involvement as manager, constitutes an unusual, non-traditional banking practice.

The affidavit does not state the bank's decision to involve Ambuehl was inconsistent with the bank's legitimate interest in protecting its security and investment in the Radloffs' operations. Mr. Hillyer's affidavit "fails to provide specific facts from the record to support its conclusory allegations." Evers v. General Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985). "Conclusory allegations without specific supporting facts have no probative value." Id. "[A]n opinion, even if rendered by an expert, does not create a genuine issue of material fact unless the expert sets forth specific facts to support his opinion." Story v. Latto, 702 F.Supp. 708, 709 (N.D. Ill. 1989).

Mr. Hillyer's affidavit appears to be little more than plaintiffs' own version of events or theory of liability "dressed up and sanctified as the opinion of an expert." Vitrebo v. Dow Chemical Co., 826 F.2d 420, 424 (5th Cir. 1987). Mr. Hillyer's opinions, even if allowed at trial, would not defeat a defense motion for a directed verdict. Summary judgment is appropriate on the Bank Tying Act claims.

8. Restraint of Trade (M.S. 325D.51-.52). Plaintiffs' allegations about an unlawful restraint of trade arising out of the spraying of the asparagus crowns or the bidding process on the Holthaus farm are without merit, far-fetched in the extreme. My prior observations regarding the circumstances under which the bank arranged to spray the crowns make further discussion of that aspect of the restraint of trade claim unnecessary here. The claim with respect to the Holthaus farm requires proof, under M.S. 325D.52, that the bank was somehow exerting "monopoly power" in the local farm real estate or asparagus markets. Plaintiffs have not produced a shred of evidence to support that contention. Indeed, it is unclear whether they even appreciate that proof of this fact would be necessary.

The claim that the bank and Mr. Ambuehl conspired together in restraint of trade fails because plaintiffs have not shown that the May 1985 Loan Agreement had an effect on individuals or entities other than the bank and the Radloffs. Proof is absolutely lacking with respect to impact on trade, increase in market, the stifling of competition and so on, all of which is necessary in an action under 325D.51.

9. Breach of Fiduciary Duty. The relationship between a bank and its borrower is not a fiduciary relationship. Klein v. First National Bank of Edina, 196 N.W.2d 619, 623 (Minn. 1972). Thus, to pursue this claim, plaintiffs must show that special circumstances existed. A good discussion of the type of special circumstances that can give rise to an actionable claim of breach of fiduciary duty can be found in Norwest Bank Hastings v. Clapp, 394 N.W.2d 176, 179 (Minn. App. 1986). Exercise by a bank of some measure of control over a customer or a customer's business is not, in and of itself, among the special circumstances recognized by the courts as a proper basis upon which to assert a claim for breach of fiduciary duty. The holding of A. Gay Jensen Farms v. Cargill, Inc., 309 N.W.2d 285 (Minn. 1981) is not to the contrary. In Jensen Farms, Cargill was held liable on the basis of principal-agent law for claims brought by suppliers and creditors against a grain elevator company. Jensen Farms is not our case.

To prove the requisite "special circumstances," the customer must show either (a) the bank's knowledge (or reason to know) that the customer is placing his trust and confidence in the bank and relying on the bank to counsel and inform him, or (b) confidence must be reposed in the bank by a customer because of the bank's knowledge, resulting in exercise of under influence over the customer by the bank. A comparison of our facts with those in Klein and Clapp or Midland Bank v. Perranoski, 299 N.W.2d

404 (Minn. 1980), as well as Richfield Bank & Trust Co. v. Sjogren, 244 N.W.2d 648 (Minn. 1976) and State Bank of Hamburg v. Stoeckmann, 417 N.W.2d 113 (Minn. App. 1987), demonstrates that Mr. Radloff's relationship with First American did not involve superiority of knowledge on the bank's part about Radloffs' affairs and operations. We likewise do not have the special placement of confidence in the bank by a weak, short-sighted, gullible or ill-advised customer.

A party opposing a summary judgment motion "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electrical, supra, 106 S.Ct. at 1356. The Radloffs have not done that here on their breach of fiduciary duty claims.

F. Punitive Damages.

My analysis of the reasons why summary judgment is appropriate in this case carries with it an implicit determination that plaintiffs have not met their burden to set forth a prima facie case of willful indifference to the rights of others. I now make the implicit determination explicit. Nothing in the Court of Appeals decision in this case (455 N.W.2d 490) requires a contrary ruling. The factual record available on this summary judgment motion was vastly more extensive than that available to Judge Klaphake when he ruled on the limited question of the applicability of M.S. 541.07(8) to the claims based upon the spraying of the asparagus crowns. I'm confident that he would have ruled as I have done, at least on the estoppel defenses, had the record before me been available to him.

G. Conclusion.

For the reasons stated in this Memorandum, the issues presented have been resolved as set forth in the Court's present Order. TJB

UNITED STATES BANKRUPTCY COURT

In Re a Petition for Relief under Chapter 7 of Title 11, U.S. Code, filed by or against the below-named Debtor(s) on October 18, 1985:

DEBTOR: STEVEN IRVIN RADLOFF of ROUTE 1, BOX 159, LITTLE FALLS, MN 56345, aka/dba RAK FARMS (DBA), OAK FARMS (DBA), SSAN: 474-54-9333

JT. DEBTOR: BARBARA JEAN RADLOFF, SSAN: 476-56-2151

CASE NO. 5-85-00162 RJK

ORDER CLOSING ASSET CASE
AND DISCHARGING TRUSTEE

SAMUEL V. CALVERT, the trustee of the estate in this case, having filed a final report and account after distribution which states that all property under 11 U.S.C. sec. 725 has been disposed of, that all property of the estate has been fully administered, and which requests that the trustee be discharged and the case closed under 11 U.S.C. sec. 350 (a); and the U. S. Trustee having filed a certificate of final audit which does not object to such discharge or closing;

IT IS ORDERED, that the trustee of the estate in this case is discharged and the case is closed.

Date: 11/28/89 /s/ Robert Kressel
Bankruptcy Judge

APPENDIX

AFFIDAVIT OF PHILLIPPE DE MAEYER

STATE OF MINNESOTA)
) SS
COUNTY OF MORRISON)

I, Phillippe De Maeyer being duly sworn upon oath, hereby states as follows:

1. I, Phillippe De Maeyer, reside at Box 252, Little Falls, Minnesota 56345.

2. I am in the business of spraying crops from an airplane.

3. On or about May 27, 1986 I sprayed Round-up herbicide upon Mr. Steven I. Radloff's property.

3. The chemical was given to me by Mr. James Ambuehl.

4. He instructed me to use this herbicide on Mr. Radloff's property North of Little Falls, Minnesota, in the presence of Mike Leonard.

5. I billed the bank for the service, they paid me what I billed. Exhibit a to this affidavit is a true and correct copy of my bill to First American Bank in St. Cloud for spraying Mr. Radloff's crops.

FURTHER YOUR AFFIANT SAYETH NOT.

By /s/ Phillippe De Maeyer

Subscribed and sworn to a notary public on August 5, 1988.

EXHIBIT A

PHIL'S SPRAYING SERVICE

Box 252 Little Falls, Minnesota 56345 Tel. 612/632-2744

Little Falls 5/29/1986.

Gentlemen,

This is the bill for the aerial spraying done on 35 acres of asparagus, North of Little Falls. The chemical used is Round-up at a rate of 1 quart per acre, mixed with 1 quart per acre of crop oil and six gallons of water.
The job was done on May 27, 7:00 PM.

TOTAL : 35 X $ 3.50 = $122.50

Thank you very much for your business,

Sincerely yours,

By /s/ Philippe De Maeyer

Philippe De Maeyer.
Chief-pilot.

(emphasis added)

AFFIDAVIT OF LEONARD B. HERTZ

STATE OF MINNESOTA)
) SS
COUNTY OF RAMSEY)

I, Leonard B. Hertz, being duly sworn under oath, deposes and states as follows:

1. I am a professor of the Department of Horticultural Science and Landscape Architecture at the University of Minnesota, St. Paul campus. My curriculum vitae is attached as Exhibit A.

2. Regarding this affidavit, I was supplied with a set of assumptions in a letter from Michael A. Pinotti dated January 9, 1989, attached as Exhibit B.

3. Attached to Michael A. Pinotti's letter of assumption is a climatological report for May 1986. With the assumptions given and the climatological report, the weather conditions were ideal for spraying and applying herbicide.

4. Also attached for reference as Exhibit C, is a document entitled "Commercial Vegetable Weed, Insect, and Disease Control Guide: Asparagus, Cucumbers, Melons, Pumpkins, Squash; Rhubarb." This document is normally produced in the course of business by the Minnesota Extension Service, University of Minnesota. This document is used in the custom, practice, and trade of farming. It is produced on a yearly basis and is a well-recognized guide within the profession of agriculture and the custom, practice, and trade of vegetable farming.

5. In my work at the University of Minnesota, I am one of the experts on the use of herbicides upon commercial vegetable crops. I am particularly knowledgeable regarding the application of herbicides on asparagus, cucumbers, melons, pumpkins, squash, and

rhubarb. I am one of the coauthors of the "Commercial Vegetable Weed, Insect, and Disease Control Guide" Asparagus, Cucumbers, Melons, Pumpkins, Squash, Rhubarb" attached herein as Exhibit C.

6. Roundup, a glyphosate based compound, is a broad spectrum herbicide. It is a contact weed killer. When applied to the leaves, stem, or flowers of asparagus, the chemical is absorbed the plant and inhibits its life processes and severely injures or kills the plant.

7. Based on the foregoing, with my knowledge of asparagus growth, the time of year the herbicide application occurred, the rate of application, and my knowledge of herbicides, I am able to reach an opinion as to the affect of the 1986 application (as evidenced by the Phil's Spraying Service invoice) on the asparagus crop.

8. The application of the herbicide Roundup severely injured or killed the asparagus. For those plants which were killed, no commercial value can obviously result. To those plants which were slightly injured, according to the producer, they were so damaged that they had to be replaced. Of the plants injured but still growing, the harvested crop value has been substantially lowered for the year of application and for all future growing years.

FURTHER YOUR AFFIANT SAYETH NOT.

By /s/ Leonard B. Hertz

Subscribed and sworn to a notary public on January 10, 1989.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

STEVEN IRVIN RADLOFF
BARBARA JEAN RADLOFF

CERTIFICATE FOR SALE, ABANDONMENT OR OTHER DISPOSITION OF PROPERTY

I, Timothy R. Walbridge, Clerk of the United States Bankruptcy Court for the District of Minnesota, do hereby certify . . . attached one page is a true and complete copy of the original . . . abandonment or other disposition of property filed on May 12, 1986 in this office in the captioned bankruptcy case by the trustee . . . debtor in possession with respect to the property described therein, and that I have searched the file and examined the docket of the court in this case, as of 8:00 A.M. on the date of this certificate, . . . that no objection to such sale, abandonment, or other disposition of property has been filed, . . . that Samuel V. Calvert is the duly appointed and acting trustee in this case or the debtor . . . the powers of a trustee, no trustee having been appointed, and that, after notice and opportunity for a hearing, the trustee or debtor in possession may sell, abandon or otherwise dispose of property including the compromise or settlement of a controversy under 11 U.S.C. Sec.s 363, 554, 704, 725, 1106 or 1107.

WITNESS my official signature
(SEAL OF BANKRUPTCY COURT) and the seal of said court at Duluth, MN in said District.

Dated: January 21, 1988.

TIMOTHY R. WALBRIDGE
Clerk of Bankruptcy Court

Clerk, U. S. Bankruptcy Court
416 U. S. Courthouse
Duluth, Minnesota 55802

By /s/ Deputy Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In the Matter of:

Steve &
Barb Radloff
Debtor.

REPORT OF ABANDONMENT
OF PERSONAL PROPERTY
$100 or less
Case No. Ch. 7 5-85-162

* * * * * * * * * * * * * * * *

Sam V. Calvert, the Trustee of the estate of the above named debtor, reports:

At the commencement of the case, there existed an interest in personal property of the estate of a value of $100 or less in excess of perfected encumbrances and allowed exemptions, described as follows: Any and all causes of action between the debtor and the First American National Bank.

The Trustee is satisfied that the above-described property is burdensome or of inconsequential value to the estate because: no specific causes of action have been determined.
and the trustee has abandoned said property.

DATED: 4-10-86

/s/ Sam Calvert
Same V. Calvert
P. O. Box 1044
St. Cloud, MN 56302

DATED: Apr 17 1986

/s/ William P. Westphal
William P. Westphal, Sr.
United States Trustee

Filed May 12, 1986
Timothy R. Walbridge, Clerk, Bankruptcy Court

By /s/ Deputy Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Steven Radloff and
Barbara Radloff

Case No. BKY 5-85-162
Debtor(s): Chapter 7 Case.

NOTICE, REPORT, MOTION AND CERTIFICATE UNDER LOCAL RULE 115(b) FOR SALE OF PROPERTY UNDER $1500, ABANDONMENT OF PROPERTY, LEASE OR PROPERTY, OR SETTLEMENT OF CONTROVERSY, WHERE CREDITOR HAS REQUESTED NOTICE UNDER BANKRUPTCY RULE 2002(i)

TO: The United States Trustee and the other entities that have requested notice.

Notice On May 3, 1986, or as soon thereafter as the transaction may be completed, subject to objection under applicable rules, the undersigned trustee will (circle one) sell property, lease property, abandon property, or settle a controversy, as follows:

Approx. 160 acres --- NE 1/2 SE 14; SE 1/4 NW 1/4; S 1/2 NE 1/4; W 1/2 NW 1/4 Less N. 208 feet of E. 800 feet of NW 1/2 NW 1/4 and N. 495 feet of NW 1/4 SW 1/4 Sec. 20, Township 130, Range 29, Morrison County, MN. Lessee: Steven I. Radloff. Lease Term: 1986 crop year Lease Price $5,000, cash __was negotiated by MONY, and a local farm advocate indicated that it seemed to be a fair price.

. . . .

MOTION AND DECLARATION The undersigned trustee reports there is no creditors' committee and that notice is given to those entities that have filed requests for notice pursuant to applicable

rules, moves the court for such orders as may be necessary or appropriate, and declares under penalty of perjury that on 5-3-86 the undersigned mailed a copy of this instrument to each entity named below at its address of record, to wit:

United States Trustee; and MONY, Chesterfield, MO

Dated and
Executed on: May 3, 1986. Signed: /s/ Sam Calvert, Trustee
Name: Sam V. Calvert
Address: 925 1st St. South
St. Cloud, MN 56302
Telephone: 612/255-1456

Certificate: The United States Trustee hereby certifies that the United States Trustee has reviewed and agrees with the reduced notice and sale, abandonment, in the foregoing instrument.

Dated: May 7, 1987 WILLIAM P. WESTPHAL, SR.
United States Trustee

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Steven Radloff and
Barbara Radloff

Case No. BKY 5-85-162
Debtor(s): Chapter 7 Case.

NOTICE, REPORT, MOTION AND CERTIFICATE UNDER LOCAL RULE 115(b) FOR SALE OF PROPERTY UNDER $1500, ABANDONMENT OF PROPERTY, LEASE OR PROPERTY, OR SETTLEMENT OF CONTROVERSY, WHERE CREDITOR HAS REQUESTED NOTICE UNDER BANKRUPTCY RULE 2002(i)

TO: The United States Trustee and the other entities that have requested notice.

Notice On May 7, 1986, or as soon thereafter as the transaction may be completed, subject to objection under applicable rules, the undersigned trustee will (circle one) sell property, lease property, abandon property, or settle a controversy, as follows:

leased property: 230 acres in Sec. 20, Green Prairie Township Morrison County, Minnesota (about 180 tillable)

lease term: 1986 crop year

lease price: $5000, cash

includes irrigation equipment per agreement with MONY

Dated and
Executed on: May 3, 1986.

Signed: /s/ Sam Calvert, Trustee
Name: Sam V. Calvert
Address: 925 1st St. South
St. Cloud, MN 56302
Telephone: 612/255-1456

FARM LEASE - CASH RENT

In consideration of the promises herein, the undersigned trustee in bankruptcy leases to the undersigned tenant the property described herein.

1. LEGAL DESCRIPTION: County of Morrison, Minnesota: 230 acres in Sec. 20, Green Prairie Twp.

2. TERM: The lease shall begin April 1, 1986, and continue until March 1, 1987. Lessee shall have a reasonable time to remove his crops.

3. RENTAL DUE: The total rental due shall be $5,000, payable cash.

4. WEED CONTROL: Tenant shall control all weeds to the satisfaction of the County Weed Inspector and mow all road ditches to the satisfaction of the Township Supervisors, except as may be required by the DNR.

. . . .

6. CHEMICALS: Tenant shall use all chemicals strictly in accordance with the manufacturer's label instructions.

7. POSSESSION: Lessor or a new tenant or purchaser may enter the land after crops are removed to prepare the land for next year's crops.

8. RE-ENTRY: If tenant fails to fulfill any promises herein, lessor may re-enter and take possession of the land without forfeiting the rents due from tenant.

. . . .

10. NON-ASSIGNMENT: Tenant may not assign or sublet this lease without written consent of lessor.

11. OTHER TERMS: none. _____

Dated: 5-7-1986

LESSOR: TENANT:

By /s/ Sam V. Calvert, Trustee By /s/ Steve Radloff

The foregoing instrument was acknowledged before me this 7 day of May, 1986, by Sam V. Calvert, lessor.

By /s/ Notary Public

The foregoing instrument was acknowledged before me this 7 day of May, 1986, by Steve Radloff.

By /s/ Notary Public

DRAFTED BY:

Sam V. Calvert, P.A.
925 First Street South
P.O. Box 1044
St. Cloud, MN 56302
(612) 255-1456

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Bankruptcy Proceeding
No. 5-85-162

Steven I. Radloff and
Barbara Radloff

ORDER

The above-entitled matter came on for hearing in the Court House at Duluth, Minnesota, on March 13, 1986. Present were Sam Calvert, the Chapter 7 trustee, Jerry Relph, appearing on behalf of First American national Bank and Royalton Acres, a partnership . . . .

The debtor appeared by means of a letter from his attorney, withdrawing his previously filed objection.

. . . .

IT IS HEREBY ORDERED

1. The trustee herein is authorized to consummate the leases described in the notice to creditors mailed by the Clerk on December 11, 1985.

2. The trustee is authorized to sell to Royalton Acres, a partnership, the property described in the notice to creditors mailed by the Clerk on February 18, 1986 upon the terms set out in said notice, except that the cash to be paid for the estate shall be $29,900.

. . . .

DATED: MARCH 18, 1986. /s/ GREGORY KISSEL
Bankruptcy Judge

Filed MARCH 19, 1986
By /s/ Deputy Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In Re:

Steven Irvin Radloff, individual, and d/b/a RAK Farms, Oak Farms, Radloff Ag. Service, Radloff Farms I, JWR Farms, Radloff-Knopick Farms, as an officer of Circle SIR Farms, Inc., and Barbara Radloff,

Chapter 11 Case No. 5-85-162

STIPULATION

Debtors.

WHEREAS, The First American National Bank of St. Cloud has proposed to lease certain property belonging to the above-captioned estate under the terms and conditions set forth in a letter dated November 18, 1985, attached hereto and made a part whereof by reference as Exhibit A; and

. . . .

WHEREAS, The First American National Bank of St. Cloud and Steven Radloff, having reached an agreement regarding the proposed lease, and Royalton Acres, through The First American National Bank of St. Cloud, and Steven Radloff have reached an agreement regarding the proposed sale of property to Royalton Acres,

IT IS NOW AND THEREFORE AGREED BETWEEN THE PARTIES:

1. That Steven Radloff herewith agrees to withdraw the objection dated February 19, 1986, to the proposed lease of real property to The First American National Bank of St. Cloud or its nominee described in Exhibit A.

2. Steven Radloff further agrees not to file or bring any objection to the proposed sale of assets to Royalton Acres or its nominee described in Exhibit B.

. . . .

IN WITNESS WHEREOF, the undersigned have executed this Stipulation on the 13th day of March 1986.

By /s/ Jerry O. Relph, Attorney for the First American National Bank of St. Cloud and Royalton Acres

By /s/ Robert L. Kalenda, Attorney for Steven Radloff

Filed MARCH 19, 1986
By /s/ Deputy Clerk

(emphasis added)

EXHIBIT A

HUGHES, THOREEN & SULLIVAN

November 18, 1985

Mr. Sam V. Calvert
Attorney at Law
925 South First Street
St. Cloud, MN 56301

Dear Mr. Calvert:

This letter is to confirm our conversation on November 8, 1985, regarding the lease of certain property from the estate of Steven Radloff. As we discussed, First American National Bank would propose to lease the property lying in Section 20, Township 130, Range 29, as well as the property in Section 22, Township 39, Range 32, both properties lying in Morrison County.

With respect to the land lying in Section 20, more particularly described as a 25 acre parcel of asparagus crowns lying on the Southerly portion of the Easterly 30 acres of the Northwest Quarter of Section 20, our proposal would be to rent the property for a period commencing January 1, 1986, through May 15, 1986, or the date which all asparagus crowns have been removed from the property, whichever is sooner. The stipulated rental would be for $600 and would permit First American to enter and remove crowns during that period. There would be no anticipated use of any irrigation or other facilities on the premises, and First American would agree to remove all crowns by the 15th day of May.

. . . .

Signed
Jerry O. Relph

JOR:ds
cc: Curtis Schmidt

(emphasis added)

LEASE

THIS INDENTURE, made March, 1986, by and between Samuel V. Calvert, trustee in bankruptcy for Steven I. Radloff and Barbara Radloff party of the first part, Lessor, and First American National Bank of St. Cloud, a national banking association party of the second part, Lessee,

WITNESSETH, That the said party of the first part, . . . does hereby Demise, Lease and Let unto the said party of the second part, . . . the following described premises, situated in the County of Morrison, and State of Minnesota, vis:

Southerly 25 acres of the Easterly 30 acres of the Northwest Quarter of Section 20, Township 130, Range 39

TO HAVE AND TO HOLD, The above rented premises unto the said Lessee, heirs and assigns, for and during the full term of two months from and after the 15th day of March, 1986, to and including the 15th day of May, 1986 And the said Lessee agree to and with the said Lessor to pay as rent for the above mentioned premises the sum of Six Hundred and no/100 ($600.00) DOLLARS for and during the full term of this Lease.

And it is further agreed by and between the parties as follows: That should the said Lessee fail to make the above mentioned payments as herein specified, or to pay the rent aforesaid when due, or fail to fulfill any of the covenants herein contained, then and in that case it shall be lawful for the said Lessor to re-enter and take possession of the above rented premises, and hold and enjoy the same without such re-entering working a forfeiture of the rents to be paid and the covenants to be performed by the said Lessee for the full term of this Lease.

. . .

(emphasis added)

By /s/ Samuel V. Calvert

FIRST AMERICAN NATIONAL BANK
OF ST. CLOUD
By /s/ Michael J. Leonard, its
Senior Vice President

Notarized

On this 27th day of March, A.D. 1986, before me, a Notary Public within and for said County, personally appeared Samuel V. Calvert, trustee aforesaid to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

By /s/ Notary of Public on January 13, 1989.

Notarized

The foregoing instrument was acknowledged before me this 27th day of March, 1986 by Michael J. Leonard, the Senior Vice President of First American National Bank of St. Cloud, on behalf of said banking association.

By /s/ Notary of Public on March 27, 1986.

drafted by:

Sam V. Calvert PA
925 1st St. South
Box 1044
St. Cloud, MN 56302
612/255-1456

AFFIDAVIT OF STEVEN I. RADLOFF

I, Steven I. Radloff, being duly sworn upon oath, hereby states as follows:

1. I, Steven I. Radloff, reside at Route 1, Box 159, Little Falls, Minnesota 56345.

2. First American Bank of St. Cloud (hereinafter "First American") is a national banking association located on St. Germain Street in the city of St. Cloud, Stearns County, Minnesota.

3. Prior to 1976, I did not have an business dealings with First American and was engaged in primarily farming dry edible beans, corn, and small grains.

4. In 1976 I borrowed my first sum of money from First American.

5. In 1978 I attempted to purchase a farm in Bellevue Township, Morrison County, in Section 20. Thomas Oothoudt was the seller. I later learned that Mike Leonard had convinced Thomas Oothoudt to sell the land to him and then approached me about renting the land, which subsequently occurred.

. . . .

12. In the fall of 1984, I became eligible for advance funds from the Agriculture Stabilization and Conservation Service (hereinafter "ASCS") for farming operations. I obtained Twenty Thousand Dollars ($20,000.00) from the ASCS. This money was unencumbered. I intended to use these funds to pay off delinquencies on the MONY real estate arrearages. This money would have prevented the MONY foreclosure process that was later commenced. Mike Leonard falsely informed me that I could not use the Twenty Thousand Dollars ($20,000.00) to pay the MONY loan, and I should use the ASCS check to pay on the First American debt. Through economic coercion, Mike Leonard persuaded me to

do this by advising me that the money received from the sale of my corn crop would be used to cover the money delinquent for First American. On reliance of the promise, I provided Mike Leonard with the check to MONY that he was to hold until the proceeds from the corn crop were received. The corn crop came in approximately three (3) weeks later, and by that time Mike Leonard had taken the ASCS check and corn check and applied them to First American loans and payment of the lease I had personally with Mike Leonard. He did not send the MONY check, as promised. See Exhibit A.

13. During the fall of 1984, pursuant to the tight control the creditor had on me, several suppliers such as Barrett Ag. Service, Howe Chemical, and Northway Oil were persuaded by Mike Leonard to supply my farming operations. This was despite the fact that they had not previously been paid. First American assured them that they would be paid and allowed me to write checks on the accounts. The creditors would then call First American to verify whether or not they would be paid. In fact, over the telephone First American verified that they would be paid, and later the checks bounced. All during this time, Mike Leonard made sure that the rent due to him on the land I rented from him was current.

14. In the early part of 1985, I had "NSF" checks in the amount of Sixty-one Thousand Dollars ($61,000.00), overdraft charges in the amount of One Thousand Five Hundred Dollars ($1,500.00), with additional borrowings of Seventy-seven Thousand Dollars ($77,000.00).

. . . .

18. In April of 1985, pursuant to First American's advice, I had limited partners of Radloff I contribute Ten Thousand Dollars ($10,000.00) towards harvesting. This commitment was based on

the promise by First American that it would also provide an additional Ten Thousand Dollars ($10,000.00) to bring the total amount of harvesting proceeds to Twenty Thousand Dollars ($20,000.00). The limited partners fulfilled their promise, but First American totally breached theirs.

19. Bills and payroll were coming due and I asked First American if they would approve the payroll checks. First American informed me that they would approve the payroll checks. I wrote out payroll checks in approximately late April of 1985 pursuant to said advice, and then First American again reneged on its promise and offered me two alternatives: (1) Sign a Thirty Thousand Dollar ($30,000.00) promissory note that conveyed all controls to all operations that I owned to First American and the new entity called "Country Fresh Produce"; or (2) face criminal charges for the bounced checks. In order to pay the payroll and suppliers, I felt that I had to sign the note, even though it was under the duress as exhibited by First American.

20. First American stated that they would provide legal aid and wanted me to sign over all deeds, and at a later date they would finance the filing of the Chapter 7. First American then advised me not to seek legal advice and not to file bankruptcy. First American informed me that if I did file bankruptcy, it would bring economic reprisals against myself and my farming operations would surely be lost. I filed Chapter 11 on June 1985.

. . . .

25. During the aforementioned auction, First American had shills bidding up the price on much of the equipment that resulted in the false inflation of the irrigation equipment that my father repurchased from the bank. First American also solicited bids for long-term crops that it had a security interest, but cautioned everyone that they had no right for entry on the premises being

sold. Therefore, First American ended up with the security interest, but not the title to these crops.

26. A Chapter 7 was filed in October of 1985, and sometime later in that same month First American obtained permission from the trustee to enter upon the Royalton farm on the pretext to have the irrigation equipment removed. They also apparently obtained permission to enter into the offices at Royalton. Without permission, however, First American's representative, removed part of my files and records to destroy any chanc I ostensibly had of suing First American for its fraudulent behavior.

27. In 1986 during the pendency of the Chapter 7 bankruptcy petition, First American was interested in buying several pieces of my property.

28. In May of 1986, First American obtained the right to harvest the asparagus crops on land that I leased from the Bankruptcy Interim Trustee, Mr. Samuel Calvert. When said rights had expired, my attorney sent a notice to First American indicating that they had lost the right to remove the asparagus crops. Ignoring the notice, First American began harvesting the crops. I then posted "No Trespassing" signs and First American ceased harvesting the crops. A confrontation then ensued between James Ambuehl, who is now chief manager of Country Fresh Produce and the agent for First American, and myself. James Ambuehl called me and threatened me with physical violence if I would not allow First American to harvest the asparagus crop. I then negotiated with Mike Leonard, through his attorney, and agreed to allow First American could harvest the crop if they were done within the next ten (10) days and paid me Two Thousand Five Hundred Dollars ($2,500.00). It was further agreed that if they did not harvest them, within the ten (10) days period, the crops were mine to harvest. On May 27, 1986, First American, who had contracted

with a local spraying service, sprayed the crop with Roundup, a commonly known deadly herbicide to all sorts of vegetation. First American purchased and delivered the chemicals used to spray the crop and gave them to the spraying service, along with their instructions. I did not confirm this information until later that night and the next day. As a result of spraying the asparagus crop with this chemical, I lost the twenty (20) to thirty (30) year perennial asparagus crop. The approximate value of the loss is One Million Seven Hundred Eighty Thousand Seven Hundred Sixty Dollars ($1,780,760.00).

29. Then during the early spring and summer of 1987, I was negotiating to purchase the other land upon which vegetable crops were growing. I was negotiating with MONY who held the underlying real estate mortgage on the Holthaus farm. I put in a bid for One Hundred One Thousand Dollars ($101,000.00) with the stipulation that the crop was included, and another Eighty Thousand Dollars ($80,000.00) without the crop. MONY had instructed me to do this because First American had threatened several times since the summer of 1986, that unless MONY conveyed the farm to them, they would destroy all crops. First American put in the bid of Eighty Thousand Dollars ($80,000.00) with the crop, and threatened to kill the crop if I received the deed. A representative from MONY called me and confirmed that he had the conversation with First American and that the threat to destroy the crop was made. I insisted that the purchase go through at a price of One Hundred One Thousand Dollars ($101,000.00), but because of the threatening behavior of First American, MONY sold it to First American to get out of the intense situation it was involved in.

30. The value of my farm was Six Hundred Fifty-seven Thousand Dollars ($657,000.00), as indicated in the balance sheets prepared by First American in contemplation of the proposed FHA

loan.

. . . .

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ Steven I. Radloff

Subscribed and sworn to before me
this 9 day of January, 1989.

/s/ Notary Public

AFFIDAVIT OF RICHARD D. HILLYER

STATE OF MINNESOTA)
) SS
COUNTY OF HENNEPIN)

I, Richard D. Hillyer, being duly sworn under oath, makes this his affidavit and states:

1. Until April 30, 1989, I was the Senior Vice President of the First Western Bank, which has numerous branches in the Minneapolis area.

2. I have been employed in the banking industry since 1956, primarily in the commercial lending area

3. I was previously the vice president and senior lender with Norwest Southwest Bank. After leaving Norwest, I was the president of First National Bank of Minnetonka and later president of Summit State Bank in Richfield, subsequently known as First Western Bank.

4. It has been my experience in the banking industry, that it is very unusual banking practice for a bank to do any of the following acts.

a) To agree to lend money to a creditor, based on a custom and practice, and then after the money has been agreed, but before the funding occurs, to unilaterally revoke such promise and materially alter the conditions of the agreement to require change in management.

b) To agree to loan money on an asset based financing arrangement and then revoke such lending agreement, based on further conditions not constituting part of the original agreement.

c) To refuse to fund an asset based financing agreement by

using economic coercion and the threat of criminal prosecution in order to induce the borrower into accepting any new condition, such as a sale, transfer, or exchange of the ownership interest.

d) To force, coerce, or through duress, require the actual ownership of the business to change hands as a condition for funding lending agreements that have already been agreed.

e) To approve each check or draft that is written, without the borrower's written consent, under a promissory note financing arrangement. Such forced approval is tantamount to virtual control over the business.

f) To agree to deliver and pay a third party through the borrower's negotiable order of withdrawal, and then revoke such agreement without notice to the borrower or without any reasons for such revocation.

5. Any of the above actions are clearly not a traditional banking practice.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ Richard D. Hillyer

Subscribed and sworn to before me
this 7 day of August, 1989.

/s/ Notary Public

AFFIDAVIT OF RICHARD D. HILLYER

I, Richard D. Hillyer, being duly sworn under oath, deposes and states as follows:

1. I retired as Senior Vice President of First Western Bank, Minneapolis, on April 30, 1989. Prior to this, I served in the banking industry since 1956, acting as a commercial lending specialist achieving the role during my tenure of Bank president and CEO.

2. I am a graduate of Macalester College, St. Paul, Minnesota, with a B.S. degree in Business Administration. I have taken several graduate classes from the University of Minnesota and in August 1974, I graduated from the Graduate School of Banking at the University of Wisconsin.

3. I have reviewed the Affidavit of Steven I. Radloff dated January 9, 1989; the Supplemental Affidavit of Steven I. Radloff dated March 9, 1989, various security agreements and promissory notes between Plaintiff and Defendants; Plaintiffs' Supplemental Answers to Defendants' First Set of Interrogatories; Deposition of Donald E. Muller dated December 14, 1989; Affidavit of Leonard B. Hertz dated January 10, 1990; Deposition of Alvina Sauer and Agreement dated May 8, 1985.

4. Based on my review of the aforegoing testimony and documents, I have concluded the following:

a. Bank exceeded its rights by managing the borrower rather than limiting its management to the collateral pledged to the borrower's indebtedness.

b. Bank officer served in a dual capacity by acting as Bank Lender and as an individual lessor.

c. Bank failed to fund agreed upon loan commitments.

d. Bank coerced borrower to agree to and enter into agree-

ments that may not have been in the borrowers best interest. Based on the foregoing, it is my opinion all of the above are not traditional banking practices.

/s/ Richard D. Hillyer

Subscribed and sworn to before me
this 11th day of June 1990

By /s/ Notary Public

The Deposition of CURTIS M. SCHMIDT, taken pursuant to Notice of Taking Deposition, taken before Kelly L. Anderson, a Notary Public in and for the County of Hennepin, State of Minnesota, taken on the 26th day of March, 1990, at 110 South Sixth Avenue, St. Cloud, Minnesota, commencing at approximately 9:20 a.m.

Q Do you know how much the bank has regained of that loss from the purchases and resale or releases of the property?

A Well, actually we sold the property as you know in '89 and I think we as a result of that sale have potential of recapturing something like 100 -- it's 180 plus. In excess I would say of $300,000 as a result of the sale. We had some difficulties as I'm sure Mr. Radloff knows and you know in the actual asparagus operation that we continually lost money as a result of weather, labor and crop markets and that type of thing.

Q In that calculation of $300,000 did you include any resale of equipment? I just want to make sure you hit all basis there.

A Well, you mean from the auction sale?

Q Yes.

A No, that doesn't include -- I don't even know what the proceeds were from the auction sale. That calculation was just based on the sale of the three parcels of property last year in '89.

Mr. Leonard agrees that FANB had Radloffs on an overdraft status with their checking account(s), starting from 1983 and intensifying in 1984 and 1985. (Leonard Depo. pp. 78-79). Mr. Leonard's deposition establishes the custom and practice between the parties where Steven Radloff would orally ask for advances under the line of credit arrangement as they needed money, and FANB would routinely approve them. Id. However Exhibits 1 through 12 and 1201 through 1240 of the Velda Swanson deposition verify that the money would be approved after the notice of overdraft came to FANB, and FANB would charge Radloffs for the overdraft. Mr. Leonard agrees that there were some checks which he did not approve. (Leonard Depo. p. 79). They were stamped with the word "NOT." Id. FANB, of course, was charging interest on the money borrowed, but at the same time it was also charging an overdraft on the line of credit arrangement it had with Radloffs. (Ex. 1-18, 1201-1240 of Swanson Depo.). The deposition of Alvina Sauer amply supports the Radloffs' position. (Tab R). During her deposition, she reviewed documents from the Velda Swanson deposition[2] (Exhibits 1-18, 1201-1240). She confirms that the Radloffs were on the overdraft list, as we read from page 18 of Ms. Sauer's deposition:

Q. Do you recall any business account having a regular position of being on that list on a regular basis that you refer to that the Radloffs were on for overdrafts?

A. Yes

Q. And was it a large number of businesses or a small number of businesses?

A. I would say, small.

Q. And would these businesses last a long time on these lists? Again, I guess we're getting into what the definition of a long time is.

A. Uh-huh.

Q. Would they last for more than a couple of months before it would be an automatic rejection?

A. No.

Q. So usually they would only last for a short period of time, like less than a couple of months, and then they would automatically be on an automatic rejection status, correct?

A. Yes.

4. Local supplies will testify that FANB made promises to lend them money for purchasing Radloffs' crops and implements (Radloff Depo. pp. 419-450).

5. FANB knew that they managed Radloffs' cash (Tabs V & W), as more fully evidenced below.

A. The Statement of Account for Radloffs dated March 31, 1983, reflects one overdraft charge and four incremental advances in the sums of $10,000.00, $100,000.00, $12,000.00, and $35,000.00 by FANB to this account. (Ex. 1239, Tab V).

B. The Statement of Account for Radloffs dated April 15, 1984, reflects two overdraft charges, one "NSF" charge, and two incremental advances in the sums of $6,000.00 and $10,000.00 by FANB to this account. (Ex. 1222, Tab V).

C. The Statement of Account for Radloffs dated May 15, 1984, reflects eleven overdraft charges, seven "NSF" charges, and five incremental advances in the sums of $8,000.00, $18,000.00, $20,000.00, $70,000.00, and $800.00 by FANB to this account. (Ex. 4, Swanson Depo. Tab W).

D. The Statement of Account for Radloffs dated June

15, 1984, reflects eight overdraft charges and three incremental advances in the sums of $8,000.00, $12,000.00, and $18,000.00 by FANB to this account (Ex. 1226, Tab V).

E. The Statement of Account for Radloffs dated November 15, 1984, reflects eleven overdraft charges, six "NSF" charges, and no incremental advances by FANB to this account. (Ex. 12, Swanson Depo. Tab W).

F. The Statement of Account for Circle Sir Farms dated April 30, 1984, reflects nine overdraft charges and three incremental advances in the sums of $18,000.00, $28,000.00, and $7,000.00 by FANB to this account. (Ex. 2, Swanson Depo. Tab W).

G. The Statement of Account for Circle Sir Farms dated June 29, 1984, reflects seven overdraft charges and two incremental advances in the sums of $2,000.00 and $10,000.00 by FANB to this account. (Ex. 1229, Tab V).

H. The Statement of Account for Circle Sir Farms dated July 31, 1984, reflects nineteen overdraft charges and one incremental advance in the sum of $40,000.00 by FANB to this account. (Ex. 15, Swanson Depo. Tab W).

I. The Statement of Account for Circle Sir Farms dated August 31, 1984, reflects twenty-one overdraft charges, four "NSF" charges, and one incremental advance in the sum of $10,000.00 by FANB to this account. (Ex. 16, Swanson Depo. Tab W).

J. The Statement of Account for Circle Sir Farms dated September 28, 1984, reflects nineteen overdraft charges by FANB to this account. (Ex. 13, Swanson Depo. Tab W).

K. The Statement of Account for Circle Sir Farms dated October 31, 1984, reflects twenty-seven overdraft charges by FANB to this account. (Ex. 3, Swanson Depo. Tab W).

L. The Statement of Account for Circle Sir Farms dated January 31, 1985, reflects ten overdraft charges, three "NSF"

charges, and five incremental advances in the sums of $8,500.00, $500.00, $300.00, $500.00, and $2,500.00 by FANB to this account. (Ex. 6, Swanson Depo. Tab W).

M. The Statement of Account or Circle Sir Farms dated February 28, 1985, reflects four overdraft charges and three incremental advances in the sums of $5,000.00, $2,000.00, and $1,000.00 by FANB to this account. (Ex. 9, Swanson Depo. Tab W).

N. The Statement of Account for Circle Sir Farms dated March 29, 1985, reflects seven overdraft charges, one "NSF" charge, and four incremental advances in the sums of $10,000.00, $5,000.00, $2,500.00, and $5,000.00 by FANB to this account. (Ex. 10, Swanson Depo. Tab W).

O. The Statement of Account for Circle Sir Farms dated April 30, 1985, reflects fourteen overdraft charges, ninety-two "NSF" charges, and one incremental advance in the sum of $11,500.00 by FANB to this account. (Ex. 7, Swanson Depo. Tab W).

P. The Statement of Account for Circle Sir Farms dated May 31, 1985 (which Radloffs never received until Muller Depo. of 12-14-89), reflects ten overdraft charges, thirty-three "NSF" charges, and no incremental advances. (Muller Depo. Ex. 3, Tab 8).

Q. Also note that Mr. Ambuehl wrote out a check to Mr. Anderson on April 30, 1985, in the sum of $16,731.00, when he was fully aware that FANB and he planned to take over Radloffs' business. (Muller Depo. Ex. 3, Tab 8).

6. Radloffs were on this overdraft status for at least two years. (Ex. 1-18, 1201-1240 of Swanson Depo.). Even on direct examination by Ms. Didier, on page 29 of the of her deposition, Ms. Sauer confirms this arrangement was not customary, as

follows:

Q. Is it possible that you had other accounts on the overdraft list while you worked in that department which were on that list longer or more frequently than the Radloffs or Circle SIR?

A. That's possible, but I don't -- I don't recall any specifics.

7. Ms. Sauer worked in the overdraft position from January 1984 to June 1985, which is approximately the same time period that the Radloffs were experiencing an extreme financial crunch. (Sauer Depo. pp. 8-9). Though Mr. Leonard abdicates the responsibility of the overdraft status to the person in charge of overdrafts (Ms. Sauer), Ms. Sauer states that it was the officers that made the decisions whether to allow the overdraft to be paid. (Sauer Depo. pp. 15-17).

EXHIBITS FROM AN AFFIDAVIT OF BANK'S IN-HOUSE COUNSEL, MR. SCHMIDT

1984 and 1985 Advances
Notes to Steven and Barbara Radloff
And/Or Circle Sir Farms, Inc.

1984

New Note #14

1-1-84	$ 144,000	Disb.
2-16-84	35,000	Disb.
3-2-84	1,500	Disb.
3-6-84	12,000	Disb.
3-14-84	1,500	Disb.
3-23-84	6,000	Disb.
Total	$ 200,000	

New Note #15

5-1-84	$ 70,000	Disb.
5-4-84	10,000	Disb.
5-8-84	20,000	Disb.
Total	$ 100,000	

New Note #16

5-21-04	$ 48,000	Disb.
6-7-84	12,000	Disb.
6-15-84	10,000	Disb.
6-19-84	7,000	Disb.
6-20-84	3,000	Disb.
Total	$ 80,000	

New Note #17, Renewal of #14

New Note #18

7-29-84	$ 40,000	Disb.
8-8-84	10,000	Disb.
Total	$ 50,000	

1985

New Note #19

1-14-85	$ 8,500	Disb.
1-15-85	2,500	Disb.
1-18-85	500	Disb.
1-23-85	500	Disb.
1-25-85	300	Disb.
Total	$ 12,300	

New Note #20

2-6-85	$ 5,000	Disb.
2-21-85	2,000	Disb.
2-25-85	1,000	Disb.
Total	$ 8,000	

New Note #21

3-18-85	$ 10,000	Disb.
3-20-85	5,000	Disb.
3-21-85	5,000	Disb.
3-28-85	25,000	Disb.
4-9-85	11,500	Disb.
Total	$ 56,500	

New Note #22

5-8-85	$ 10,000	Disb.
5-16-85	0 4,500	Disb.
5-24-85	3,000	Disb.
6-3-85	5,000	Disb.
6-7-85	3,000	Disb.
6-17-85	4,000	Disb.
Total	$ 29,500	

7. Ms. Sauer worked in the overdraft position from January 1984 to June 1985, which is approximately the same time period that the Radloffs were experiencing an extreme financial crunch. (Sauer Depo. pp. 8-9). Though Mr. Leonard abdicates the responsibility of the overdraft status to the person in charge of overdrafts (Ms. Sauer), Ms. Sauer states that it was the officers that made the decisions whether to allow the overdraft to be paid. (Sauer Depo. pp. 15-17). Mr. Leonard recalls that from 1984 the overdraft situation became more prevalent (Leonard Depo. p. 83) as verified by Exhibits 1 through 12 and 1201-1240 of the Velda Swanson deposition. Mr. Leonard even acknowledged that when Steven Radloff would come in with cash flows that were unacceptable to FANB, the only way that Steven Radloff would be able to obtain the money would be to alter the cash flows to reflect what FANB was willing to lend. (Leonard Depo. pp. 84-87; Radloff Depo p. 421). Mr. Leonard agrees that he did not fund the promissory note all at once, but funded it according to a so-called budget. (Leonard Depo. p. 89). Radloffs would call him to obtain approval for the funds and then they would write the checks. (Leonard Depo. p. 89).

8. In addition to FANB's daily control over Radloffs' cash, FANB forced Steven Radloff to search for financing alternatives. While Steven Radloff was required to do this, this left Mr. Ambuehl in charge of the farming operation. (Leonard Depo. pp. 87-88). FANB advised on how to obtain this financing to the point where Radloffs engaged in a limited partnership called Radloff I. (Leonard Depo. pp. 74-76). At the same time, FANB would refuse to fund Radloffs' original budget request and ordered

Radloffs to reduce their request to a level acceptable to the bank. (Leonard Depo. pp. 76-77).

9. From Exhibits 1 through 12 and 1201 through 1240 of the Velda Swanson deposition, coupled with Alvina Sauer's, Michael Leonard's, and Donald Muller's depositions, establishes that FANB acted as Radloffs' (fiduciary) treasurer. The situation came to a point where the suppliers were calling FANB and asking if particular checks had cleared (Leonard Depo. p. 90) or were negotiable (Leonard Depo. pp. 74-76). Mr. Donald Muller, then Mr. Leonard's subordinate and now his replacement, agrees that the method of approving checks on a daily basis is unusual, even outside of their own banking community. (Muller Depo. pp. 74-75). He also agrees that it would be improper to change the terms and conditions of the lending arrangement, even an oral lending arrangement, without justification. (Muller Depo. pp. 77, 80-82). So the issue of FANB's control and domination over the Radloffs' operational affairs is established. They owed a fiduciary duty to Radloffs. (Infra. p. 24).

10. Evidence of the breach is as follows:

A. The inordinately large amount of nonnegotiated checks written, but not approved by FANB. (Swanson Depo. Ex. 1-12, 1201-1240).

B. The threatened criminal charges against Radloffs. (Aff. of S. Radloff ¶ 19).

C. The underhanded dealing between Mr. Leonard and Mr. Ambuehl, as evidenced by the Country Fresh Produce check ledger, establishes a secret business dealing between Mr. Ambuehl and Mr. Leonard. (Ex. D to Def.

Resp. to Pl. Fst. Req. for Admin.).[3]

D. Secret payment of Mr. Ambuehl's services. (Ex. D to Def. Resp. to Pl. Fst. Req. for Admin.). These checks were written seven days before the May 8 1985, agreement.

E. Refusal to release the funds previously approved. (Aff. of S. Radloff ¶ 19).

F. The threat of criminal coercion resulted in the May 8, 1985, agreement. (Aff. of S. Radloff ¶ 19).

11. In late 1984, Radloffs acquired enough funds from unsecured sources to pay a real estate mortgage payment, which was already late. (Aff. of S. Radloff ¶¶ 12-13, 31). Steven Radloff went to FANB and disclosed to Mr. Leonard that he planned to use this money to pay for the real estate mortgage. Id. Mr. Leonard then told him to apply the money to FANB's loans and when Radloffs' grain receipts came in, FANB would pay the real estate mortgage installment. Id. (Radloff Depo. pp. 191-194). A similar circumstance occurred and promise was made concerning Radloffs' chattel mortgage payment on their tractor. Id. FANB failed to honor both promises. Id. (Ex. A & B to Aff. of S. Radloff).

12. Mr. Leonard agreed that FANB did not have any legal claim to the $20,000.00 that Radloff received from the ASCS. (Leonard Depo. p. 97). He agrees that foreclosure by Mutual of New York Life Insurance Co., Inc. (hereinafter referred to as MONY) would have put FANB's interest in jeopardy. (Leonard Depo. p. 96). He also remembers that the Radloffs were late on

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[3]Refers to Defendants' Response to Plaintiffs' First Request for Admissions. Filed with the Affidavit of Michael A. Pinotti dated March 22, 1990.

their chattel mortgage payments on their tractor to Ford Motor Credit. Id. Mr. Leonard further recalls that he asked Steven Radloff to put the money towards FANB's loan. (Leonard Depo. p. 97). If Radloffs would follow the budget, according to Mr. Leonard's representation, then FANB would be paid off and he would have additional funds to make those checks good. (Leonard Depo. pp. 94, 97-98). In October and December Mr. Leonard made calculations on the amount of money owed to FANB, as evidenced by Exhibit A and B to his affidavit (Leonard Depo. Ex. 2). He also knew of the overdraft status as evidenced by Exhibit A to his affidavit (Leonard Depo. Ex. 2). Mr. Leonard says that the entire debt was suppose to be paid off by selling the corn, bean, and asparagus crops in April of 1985. (Leonard Depo. p. 100). But the only real proceeds that FANB contemplated receiving in late autumn 1984, were proceeds of the sale of corn and soybeans from the Radloff operation. (Leonard Depo. p. 102). Even if they sold everything according to the statement (Ex. 2 to Leonard Depo.), they would still be short almost $300,000.00. (Leonard Depo. p. 102). The evidence establishes with FANB's false representations.

13. On or about March 1, 1985, Mr. Leonard received a letter from Charles L. Horn of the law firm of Faegre and Benson in Minneapolis, Minnesota. (Ex. F-5 to Pl. Pun. Dam. App.).[4] FANB, through Mr. Leonard, knew that MONY had commenced foreclosure proceedings against Radloffs' real estate upon receipt of Mr. Horn's letter.

14. Meanwhile, FANB's own projected income studies for Radloffs' operation completed in early 1985, showed Radloffs' estimated net cash income to be $16,000,000.00 over 15 years.

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[4]Refers to Plaintiffs Punitive Damage Appendix.

(Ex. 8 to S. Radloff Depo. & pp. 400-401).

15. After withholding the real estate of chattel mortgage payments, FANB began to renege on its promises made under its restrictive cash arrangement. Id. (Aff. of S. Radloff ¶¶ 12, 13, 31). Specifically in April 1985, Radloffs requested an advance to cover upcoming harvesting costs. (Aff. of S. Radloff ¶¶ 13-14 & 19). FANB knew it took several years before the asparagus crops produced very little cash. (Leonard Depo. p. 69). This would have been the first year the asparagus crops were expected to return a positive cash flow. (Aff. of S. Radloff ¶¶ 13-14, 19). FANB agreed to the advance, as had been its custom. Id. See also V. Swanson's Exhibits 1201-1202.

Checks were written by Radloffs in reliance upon this promise. Id. When the checks were presented for negotiation FANB, Mr. Leonard insisted that in order to clear the checks, Radloffs were required to sign over their operations to FANB. Id. If the operations were not signed over, FANB threatened that Radloffs would be turned over to criminal authorities for writing "bad" checks. Id.

16. Steven Radloff recalls that Mr. Leonard told him that a new entity had to be established in order to better account for expenses between Circle Sir Farms, which managed crops owned by Radloffs alone and those crops he owned in the partnership known as Radloff I. (T. Aff. of S. Radloff ¶ 11, Tab 1).[5] Steven Radloff wrote the $10,000.00 check payable to Country Fresh Produce on April 29, 1985, in reliance upon Mr. Leonard's representation that this company would be controlled by the Radloffs. Id. Unbeknownst to Radloffs, the check was later endorsed by Mr. Ambuehl and deposited into the Country Fresh

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[5]Refers to the Third Affidavit of Steven Radloff dated June 13, 1990.

Produce account, which had been set up on the same day of April 29, 1985.[6] (T. Aff. of S. Radloff ¶ 11 & Ex. D; See also Radloff Aff. ¶ 18). FANB had Mr. Ambuehl open a checking account in the name of Country Fresh Produce. (Ex. D. to Def. Resp. to Pl. Fst. Req. for Admin.).[7]

17. On May 8, 1985, FANB and Mr. Ambuehl took over Radloffs' operation, by duress of criminal prosecution, under the name of Country Fresh Produce, an unincorporated association.[8] (Ex. A. to Def. Resp. to Pl. Fst. Req. for Admin.). The funds from this coerced agreement were deposited in the Country Fresh Produce account. (Ex. C. to Def. Resp. to Pl. Fst. Req. for Admin.). FANB appointed Mr. James Ambuehl to be the operations manager. (Ex. C. to Def. Resp. to Pl. Fst. Req. for Admin.; Ex. G to G-2 of Pl. Pun. Dam. App.). Mr. Ambuehl had, up until that time, worked for Radloffs. Id. He was paid $1,200.00 by FANB to defeat Radloffs' interests. (Check No. 8, Ex. C. to Def. Resp. to Pl. Fst. Req. for Admin.). FANB began to acquire all of Radloffs' interests in personal and real property. (Aff. of S. Radloff ¶ 20).

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[6]On April 12, 1990, Radloffs finally received from Defendants the transaction which triggered the initial deposit into the Country Fresh Produce Account. As such, Radloffs were deprived of the ability to cross-examine Mr. Leonard, Mr. Muller, and Mr. Ambuehl concerning this transaction. (Aff. of M. Pinotti dated April 30, 1990).

[7]This action make the adjudicated facts in State v. Ambuehl, 176 N.W.2d 893 (Minn. 1970), material to the jury's determination of his credibility. As a police officer, this man participated in a burglary ring against three merchants in Benton County. (Ambuehl Depo. April 5, 1990, p. 8, Tab N).

[8]One company which filed criminal charges (Evergreen Equipment) against Steven Radloff was an FANB customer and Mr. Ambuehl's former employer. (T. Aff. of S. Radloff ¶ 5).

18. Radloffs were forced into bankruptcy on June 20, 1985, by filing a Chapter 11 petition. June 20, 1985, was also the date scheduled for the mortgage foreclosure sale on Radloffs' real estate interests. On October 11, 1985, Radloffs' motion to convert the case to a Chapter 7 was granted.

19. These facts (1-19) establish that FANB was Radloffs' treasurer and fiduciary, FANB controlled the operation through the piecemeal disbursements of the loan funds, and the ordinary and customary way that the parties conducted business was breached in April and May of 1985. As a result of FANB's refusal to honor the checks that they had previously approved, they succumbed to FANB's coercion and duress by signing over their business.

20. FANB and Mr. Ambuehl continued to operate Radloffs' former farming operation after Radloffs bankruptcy, as evidenced by the Country Fresh Produce check ledger. (Ex. C to Def. Resp. to Pl. Fst. Req. for Admin; Leonard Depo. p. 204). In the spring of 1986, FANB formed three entities: First Farm Corporation Inc., of St. Cloud (Bank's Farm); Royalton Partners, which later became a partnership; and Farm Fresh Produce, an unincorporated association. (See, Res. to Pls. 2nd Dem. for Docs. attached to Aff. of M. Pinotti dated January 12, 1989). Radloffs and FANB (with all of these other entities) began to compete for the right to own, possess, and manage the various parcels of property.[9] (See Ans. to Pls. Fst. Set of Int. attached to Aff. of M. Pinotti dated January 12, 1989). This competition further developed over time to include the ability to market the asparagus crops grown on several parcels of Radloffs' real estate. (Leonard Depo. p. 181).

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[9]In the spring of 1986, FANB entered into an option contract to purchase the Kloss farm, which immediately adjoined the Holthaus property and was not part of the Radloffs' bankruptcy. (Nos. 2E & 2F, Def. Resp. to Pits. 2nd Req. for Admin., Tab 5).

21. In the early spring of 1986, FANB submitted an offer to purchase the right to harvest said crops with the interim trustee, Samuel Calvert. (Item 24, Cert. Cs. from Rd. Bkcy).[10] Radloffs in turn submitted a bid to purchase the same. (Item 22, Id.). At the same time, Radloffs objected to the sale. Id.

22. Negotiations led to the stipulation that FANB was to harvest the crowns by May 15, 1986, or the asparagus crowns would revert to Radloffs. (Aff. of S. Radloff ¶ 28). A letter from FANB's attorneys dated November 18, 1985, evidencing this agreement, was incorporated as Exhibit A to the stipulation and states that the termination date was May 15, 1986. (Tab P, specifically Item 24, Cert. Cs. from Rd. Bkcy.).

23. Radloffs obtained a valid lease on the land to farm these asparagus crops from the interim trustee on May 2, 1985. (Aff. of S. Radloff ¶ 28; Calvert Depo. pp. 18-19, 59, ref. to Pl. Pun. Dam. App. I-9).

24. FANB began to harvest the crop, but failed to finish its task by May 15, 1986. (Aff. of S. Radloff ¶ 28). FANB forfeited its rights to harvest said crops by failing to abide by the agreement it had drafted. Id. When FANB attempted to continue, Radloffs, the lessee and now holder of the rights to harvest the asparagus, objected. Id. Steven Radloff called the sheriff and posted "No Trespassing" signs. Id. . . . .

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[10]Refers to items contained within a bound volume of certified copies from Radloffs' bankruptcy proceedings, entitled Exhibit A, and referenced herein in Tab P.

EXHIBITS FROM SUPPLEMENTAL AFFIDAVIT
OF STEVE I. RADLOFF

Exhibit D

Steve Radloff
Rt. 1 Box 159
Little Falls, MN 56345

The Mutual Life Insurance Co. of New York
16216 Baxter Road
Suite 250
P. O. Box 1077
Chesterfield, MO 63017

Dear Mr. Goplen:

This is to confirm our telephone conversation of 7-14-87. I am making the following offers on the farm near Royalton.

OFFER #1 $101,000.00 - subject to the following conditions.

A.) the growing long terms crops (asparagus, raspberries, and strawberries) remain in a reasonable healthy condition and are not destroyed or removed.

B.) I am able to obtain financing within 45 days.

OFFER #2 $80,000.00 subject to the following condition.

A.) I am able to obtain financing within 45 days.

If there are any further questions about this, please contact me. Also if these offers are not accepted, I would like a full explanation on the refusal on both offers.

Thank you for your help and consideration.

Sincerely Yours,
/s/ Steve Radloff

Exhibit G

[The key to Exhibit G, to the Supplemental Appendix of Steven I. Radloff is Exhibit H, immediately following.]

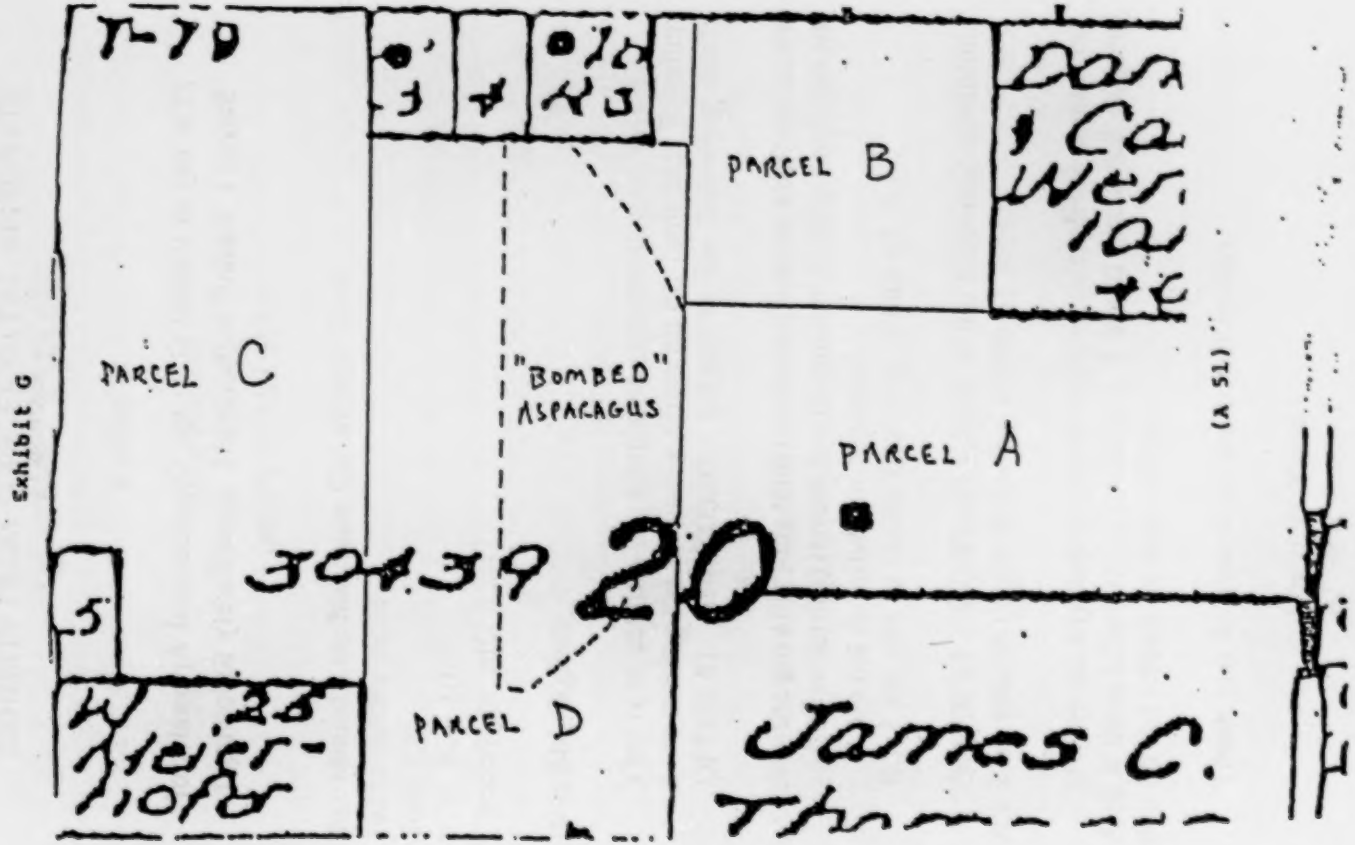
Exhibit G
I-70
PARCEL B
PARCEL C
"BOMBED" ASPARAGUS
PARCEL A
PARCEL D
(A 51)
30439
20
James C.

EXHIBIT H

[Parcel A]. South half of Northeast Quarter (S 1/2 of NE 1/4) of Section Twenty (20), Township One Hundred Thirty (130), Range Twenty-nine (29), less the North 365 feet of the East 485 feet thereof, Morrison County, Minnesota.

[Parcel B]. 40 acres: Northwest Quarter of Northeast Quarter (NW 1/4 of NE 1/4), Section Twenty (20), Township One Hundred Thirty (130), Range Twenty-nine (29) Morrison County Minnesota.

[Parcel C]. 86 acres: West Half of Northwest Quarter (W 1/2 of NW 1/4), less the North 208 feet of the East 800 feet of Northwest Quarter of Northwest Quarter (NW 1/4 of NW 1/4) and the North 495 feet of the Northwest Quarter of Southwest Quarter (NW 1/4 of SW 1/4) of Section Twenty (20, Township One Hundred Thirty (130), Range Twenty-nine (29), described as follows, to-wit: Beginning at the Southwest corner of the North 495 feet of said Northwest Quarter of Southwest Quarter (NW 1/4 of SW 1/4); thence East along the South line of said North 495 feet of the Northwest Quarter of Southwest Quarter (NW 1/4 of SW 1/4) for a distance of 660 feet; thence Northwesterly on a straight line to a point on the West line of said Section Twenty (20) at a point 660 feet North of the point of beginning; thence South 660 feet to the point of beginning, Morrison County, Minnesota.

[Parcel D]. Home Farm - 100 acres: Northeast Quarter of Southwest Quarter (NE 1/4 of SW 1/4), Southeast Quarter of Northwest Quarter (SE 1/4 of NW 1/4), South Half of Northeast Quarter of Northwest Quarter (S 1/2 of NE 1/4 of NW 1/4), Section Twenty (20), Township One Hundred Thirty (130), Range Twenty-nine (29), Morrison County, Minnesota.

THIRD AFFIDAVIT OF STEVEN RADLOFF

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Steven Radloff, being first duly sworn, makes this his affidavit and states:

. . . .

2. At the time of the abandonment, the value of the claims was unknown. We thought injustices were done by First American National Bank of St. Cloud (hereinafter FANB), but it had yet to be determined if they were (1) legally enforceable by the courts, (2) if they were of sufficient value to proceed with a case, and (3) we had to find an attorney that would be willing and able to take said case. Thus it was a true statement given to Mr. Calvert when Mr. Kalenda said our claims were undefined and of unknown value. We offered and paid $100.00 to the trustee for the abandonment. (Exhibit A) Plus, it was the later additional activities, the personal threat, the bombing, and the 1987 interference that helped us to understand and aid our investigation into earlier actions. Even with such additional activities, it took us over two years to file this lawsuit.

. . . .

4. Attached as Exhibit B is a copy of the ASCS's check issued in November 1984.

5. Attached as Exhibit C is a true and correct copy of a criminal complaint filed against me. This criminal complaint was filed by Evergreen Equipment. Mr. Ambuehl told me that he worked for Evergreen Equipment just before he started to work for us. Evergreen Equipment was a customer of FANB through a Farm Plan installment purchase arrangement, that I

had in fact used.

. . . .

7. Our corn proceeds, which we received in December 1984, were deposited within our personal checking account. (Exhibit D) FANB took it all for their own purposes.

8. We never received on cent from the May 8, 1985 agreement and related promissory note. Two weeks earlier FANB had represented to me that they had already provided those funds, as had been their practice. Our checking account verifies our reliance.

. . . .

11. Exhibit E is the April 29, 1985, check Mr. Leonard told me to write out. Mr. Leonard told me that a new entity had to be established in order to better account for expenses between Circle Sir Farms, which managed crops owned by ourselves alone, and those crops he owned in the partnership known as Radloff I. Mr. Leonard stated that this company would be controlled by myself. I have learned from FANB's document disclosure on April 12, 1990, that this check was later endorsed by Mr. Ambuehl and deposited into the Country Fresh Produce account, which had been set up on the same day (April 29, 1985).

12. Exhibit F is a true and correct copy of my financial statement filled out by Mike Leonard for FANB. It shows our financial net worth to be in excess of $800,000.00 as of January 18, 1984.

13. Concerning the September 5, 1985, public auction sale, FANB's attorney represented to us that this sale would only be of the equipment. (Exhibit H) I was present for this auction. When the potential sale of the asparagus crops came during this auction, nobody made a public bid nor did any public sale occur.

14. As only one example of how FANB interfered with my

business dealings with third parties, Exhibits I through I-5 are series of agreements and correspondences between myself and Mr. Hal Sundvahl. FANB refused to honor these agreements even though the check was made out to Mr. Leonard and myself. Mr. Leonard had me endorse the check and he took it for his own personal use.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ Steven I. Radloff

Subscribed and sworn to before me
this 13 day of June, 1990.

/s/ Notary Public

EXHIBIT A

HALL, BYERS, HANSON, STEIL & WEINBERGER, P.A.
ATTORNEYS AT LAW

February 25, 1986

Mr. Sam Calvert
925 1st St. So.
St. Cloud, MN 56301

Re: Steven Radloff
our File No. 6987.1

Dear Mr. Calvert:

Enclosed for your consideration please find a report of abandonment of personal property for $100 or less regarding the Steven Radloff bankruptcy.

Thank you for your cooperation in this matter. If you are in need of additional information please feel free to contact me.
Sincerely,

FOR THE FIRM

/s/ Robert L. Kalenda

RLK:vmp

Enclosure

EXHIBIT B

UNITED STATES DEPARTMENT OF AGRICULTURE
COMMODITY CREDIT CORPORATION

CCC 188 DATA TRANSMITTAL
11640860

FOR:

DATE (MO., DAY, YR.)	ST. & C). CDE & C/D	IDENTIFYING NO. & C/D
11 20 84	27 097 6	474 54 9333 0

PROGRAM CODE	FARM NO.	LOAN CONTROL NO.	AMOUNT
85MULPA	12 242		23243.19

PAYEE
Steve Radloff
Route 1
Little Falls MN 56345

NOT NEGOTIABLE

SPECIAL DATA
DIVA/PR12528WHT/DEFA/PR29203WHT/PR2195116CORN-/PR87472BRLY

/s/ _____

/s/ _____

COUNTY OFFICE COPY

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF MORRISON COMPLAINT-WARRANT FOR MISDEMEANOR

State of Minnesota, Plaintiff,

County Court File NO. MC 85

Steve Radloff, Defendant. ____Attorney File No. ___

COMPLAINT

The Complainant being duly sworn, makes complaint to the above-named Court and states that there is probable cause to believe that the above-named Defendant committed the offense described below. The Complainant states that the following facts establish PROBABLE CAUSE:

Complainant, John Smude, is the President of Evergreen Equipment, Inc., located at Highway 27 East, Little Falls, MN. On April 17, 1985, the above-named defendant cashed a business check at Evergreen Equipment in the sum of $113.37, which check was in words and figures as follows:

. . . .

April 17, 1985

Evergreen $113.37
One Hundred Thirteen and 37/100

FIRST AMERICAN NATIONAL BANK /s/ Steve Radloff
of St. Cloud
St. Cloud, Minnesota 56301

The above-named defendant received merchandise in exchange. The check was returned to complainant unpaid by reason of Insufficient Funds. A Notice and Demand for Payment of

Dishonored Check was sent to the defendant by certified mail, but was returned unclaimed. Complainant also seeks service charge of $15.00.

The above-facts constitute the Complainants basis for believing that the above-named Defendant, on the 17th day of April, 1985 at Morrison County, Minnesota in the above-named County, committed the following described

OFFENSE

Charge: Issuance of Worthless Check

In Violation of Section: 609 535

That on or about the 17th day of April, 1985, the defendant did issue a check or other order for the payment of money, which at the time of issuance, he intended not be paid.

THEREFORE, Complainant requests that said Defendant, subject to bail or conditions of release where applicable.

(1) be arrested or that other lawful steps be taken to obtain Defendants appearance in court; or

(2) be detained, if already in custody, pending further proceedings; and that said Defendant otherwise be dealt with according to law.

Complainant /s/ John Smude

Being duly authorized to prosecute the offense charged, I hereby approve this Complaint.

/s/ Conrad I. Freeberg

Conrad I. Freeberg, Asst. Co. Attorney, 111 S.E. 1st Ave., Little Falls, MN (612) 632-2941 Ext. 190

. . . .

EXHIBIT H

HUGHES, THOREEN & SULLIVAN

August 9, 1985

Robert Kalenda [Esq.]

Dear Mr. Kalenda:

I have this date forwarded to the Court the Order in the Radloff Bankruptcy. I am in receipt of Mr. Kalla's letter of August 9th, indicating his apparent disagreement with what I had understood to be an agreement regarding the contents of the Order.

. . . .

It is my recollection that Mr. Radloff has agreed to cooperate with the sale of the farm equipment constituting the collateral which was released from the stay of actions and that you had indicated to me that no further state action would be necessary in order to effectuate the sale.

/s/ Jerry Relph

(emphasis added)

EXHIBITS I THROUGH I-5

LEASE AGREEMENT

Between Hal R. Sundvahl, Steven Radloff, and Mike Leonard.

One hundred (100) acres of irrigated land at One Hundred Dollars ($100,00) per acre and necessary headlands outside watered acres. Lessor agrees to pay taxes and have irrigation equipment in working order with safeties working.
February 1, 1985 to February 1, 1986.
Five Thousand Dollars ($5,000.000) on signing of contract and balance due December 15, 1985.

SIGNED: /s/ Hal R. Sundvahl

/s/ Steven Radloff

Check No. 2174 dated January 29, 1985

From:
Royal Farms
Hal R. Sundvahl, II
PHONE 612-632-3847
110 Zebulon Shores Drive
Little Falls, MN 56345

TO:
Mike Leonard and Steve Radloff

AMOUNT:

$5,000.00

For:
1/2 1985 - 100A Lease

ROYAL FARMS
110 Zebulon Shores Drive, Little Falls, Minnesota 56345

May 15, 1985

Mr. Mike Leonard
110 St. Germain
St. Cloud, Minnesota

Mr. Steve Radloff
Circle Sir Farms
Royalton, Minnesota

Re: 100 Acre Irrigated
Land Lease

Gentlemen:

This letter will serve to record the various situations that exist with the above lease.

On Friday, April 12th, Jim Ambuehl was notified, as we had agreed to do, that we were starting to plow that day and would be needing the prinklers [sic] on the above tract of land working by early, the week of April 15th, when we would start planting. The above procedure had been established long in advance of these dates, since it is necessary to work on water drive spinklers [sic] while they are in operation.

To this date, the sprinklers are still not in working order.

There is no question that a great deal of effort has been expended trying to get the sprinklers to work. But to date, all has failed.

The seriousness of the situation exists in that the required portion of the lease has been paid, the fields limed (two kinds), fertilized and the potatoes planted. The plants are up, and still the systems are not working. The crop is already damaged due to all of the traffic and washing in the planted fields trying to get them to work. I have over $60,000.00 invested in the 100 acre field to date and have contracted the crop from the field for $160,00.00. This is a potential very large damage amount to say nothing of the damage caused by not being able to fulfill my contract with the potato processor.

Gentlemen, the situation is serious and serious right now. We must have water and dependable water immediately to water in the herbicide applied as we cultivate. Every day that passes without water makes the problem more serious and the yield loss larger. Everybody as been good to work with on this problem and hopefully it will be solved. A lot of conversations and meetings have transpired, but as of this writing, no solution has been found. We do not have the time to waive for parts suppliers and sprinkler companies to be 3 or 4 days or a week to get to the site.
Sincerely yours,

/s/ Hal R. Sundvahl, II

cc: Mr. Jim Ambuehl

FARMERS' [THEN] ATTORNEY'S INTRA-OFFICE MEMO DATED MAY 8, 1985 - NO MENTION IS MADE OF AGREEMENT WITH BANK

MEMORANDUM

TO: File No. 8390.2

DATE: May 8, 1985

FROM: SBK

I met with Steven Radloff regarding several matters. Initially, Steve has indicated that he has a lot of debt which he is now unable to service. It also appears that he will not be able to obtain certain FMHA loans which he had applied for some time ago.

The Bank now wishes Steve to start liquidating his real estate. He will have to determine what net loss carryforwards that Steve has in order to make a decision as to what he can and cannot do. The last thing we want is to have a large tax liability generated by Steve through the sale of his land. Tax liens are not discharges in bankruptcy so we should be very careful in doing Steve's financial planning.

We will also need to call Tom Godzala at the Perry law office regarding the Archer Supply debt. Steve has not given us a copy of the Complaint but he believes he was served on April 20, 1985.

SBK:slm

AMENDED AFFIDAVIT OF MICHAEL J. LEONARD

STATE OF MINNESOTA)
) SS.
COUNTY OF STEARNS)

I, Michael J. Leonard, being first duly sworn on oath, depose and state:

1. That I reside at Rural Route 2, Clearwater, Stearns County, Minnesota.

2. That at all relevant times herein I was an agricultural loan officer at The First American National Bank of St. Cloud (FANB) and the President of First Farm Corporation, Inc., when it was formed (FFC). During this period of time, I was promoted to Vice President and Senior Vice President of FANB. At all times relevant hereto, I was also an officer of First American Farm Corporation.

. . . .

18. In response to paragraph 28 of Plaintiff's Affidavit, . . . The herbicide "Round-up" has a very short "carry-over" period so that crops can be planted within days of its use. To my recollection, Mr. Ambuehl was not requested to make any contact with Plaintiffs during the time in question.

19. First Farm Corporation, Inc. is a partner in Royalton Partners, a Minnesota partnership.

Dated: March 3, 1989 /s/ Michael J. Leonard

Subscribed and Sworn to before
me this 3rd day of March, 1989.
/s/ Notary Public

AFFIDAVIT OF ROBERT L. KALENDA

I, Robert L. Kalenda, being duly sworn under oath, deposes and states as follows:

1. I am a duly licensed attorney in the state of Minnesota.

2. I was an associate of the law firm of Hall, Byers, Hanson, et al., in St. Cloud, Minnesota, and represented Steven I. and Barbara Radloff in their bankruptcy proceedings.

3. I initially represented the Radloffs in a Chapter 11 proceeding that was subsequently converted to a Chapter 7 proceeding.

4. During the course of my representation, I learned that the bank had commissioned an aerial spraying firm to spray herbicide on crops that the Radloffs had an interest in north of Little Falls, Minnesota. Mr. Radloff had made a number of attempts to bide for these crops and would have had the right to acquire these crops had the bank not fulfilled its promise of harvesting the crowns within a certain date by the end of May, 1986. Mr. Radloff called me on approximately May 30, 1988, and informed me that the spraying had occurred.

5. I immediately telephoned Curtis M. Schmidt, the bank's in-house counsel, and asked him why the bank had sprayed the crops with herbicide that I understood, from talking with my client, as a deadly herbicide. The bank, through Mr. Schmidt, acknowledged that it was a deadly herbicide and stated that "It was our crop and we could do anything we wanted to". Either that say day or within 24 fours in another conversation with either Mr. Schmidt, Mr. Mike Leonard, loan officer, or Mr. Jerry Relph, the banks outside counsel, I was told that "The crop was sprayed because if the bank couldn't have it there was no reason Radloff should". (Emphasis added.)

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ Robert L. Kalenda

Subscribed and sworn to before me
this 9th day of January, 1989.

/s/ Notary Public

Deposition of MICHAEL LEONARD, taken pursuant to Notice of Taking Deposition, and taken before Sheila D. Fearing, a Notary Public in and for the County of Douglas, State of Minnesota, on the 20th day of February 1990, commencing at approximately 11:00 in the morning, at the law offices of Hughes, Thoreen, Matthew & Knapp, Suite 200, 110 South Sixth Avenue, in the City of St. Cloud Minnesota.

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Q And then James Ambuehl, working through Farm Fresh Produce, was the operator of the actual farming?

A The partnership. And, here again, I'd have to refer back to the specific documents that we'd have over a period of time. But it was, in general, without referring back to some specific ones, he was contracted to do the things that were outlined in these agreements.

Q And most of these agreements were oral initially, and then you put them in writing in June of 1986; is that a fair statement?

A I don't know what you mean by "most of these."

Q Do you recall any written agreements before June of 1986 between Royalton Partners and Mr. Ambuehl or the bank and Mr. Ambuehl or First Farm Corporation, Inc. and Mr. Ambuehl?

A Not that I know that we haven't already produced. Excuse me. Are you talking about oral or written ones?

Q Just written, sir.

A Okay.

Q You did have oral agreements that preceded or occurred before the June 1986 written agreements, correct?

Q There was possibly a period of time that we would have some

oral ones.

Q And you were paying Mr. Ambuehl some sum of money for services rendered as an independent contractor before June of '86?

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A Yes, something to that effect.

Q And what was that account used for, sir?

A That was an in-house and expense on a particular -- relating to what we were doing here.

Q And so that account was specifically set up to handle the bank's interest in what used to be Radloff's crops and equipment?

A I don't know if that's specifically all it was set up for, but it was primarily set up for an accounting practice.

Q Did you use the checking account for other business purposes other than the businesses that related to what Radloffs used to own?

A I don't recall that, but the particular items will stand on their own. But I don't recall that.

Q Now, going back a second to the bank's plan of these method of protecting a bank's interest was approved by the board of directors of the bank?

A I can't speak for them.

Q Was it approved by the president?

A Each officer had a certain amount of discretion in handling their account, so I don't know if it was . . .

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Q Do you understand it now that he had the right to buy it like anybody else?

A It was my understanding that anybody could buy those rights from him, and not excluding Mr. Radloff.

Q And did you understand that at the same time in May and July of 1986 that he had the right to redemption, that is a common right on mortgage foreclosures?

MS. DIDIER: I object. That' a misleading question. . . .

MR. PINOTTI: I'm asking for his understanding. . . .

MS. DIDIER: How is that relevant?

MR. PINOTTI: Well, he's admitted that Mr. Radloff had an interest in the property as a purchaser.

MS. DIDIER: No he hasn't admitted that. He's admitted --

MR. PINOTTI: Like anybody else.

Q No?

A I admitted that he had the opportunity to buy it just like anybody else.

Q Now I'm asking about what your understanding is concerning his right to redeem.

A That I would leave to legal counsel.

. . . .

Q In what capacity did the bank act at this time? Did they act through you or through the legal counsel?

A I'd have to check the records to my involvement at that time.

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Q (By Mr. Pinotti continuing) I hand you what has been marked as Leonard Exhibit No. 14, and it's several pages of checks. One in particular is Check No. 2 in the amount of $8100 payable to Jim Ambuehl. I'm also giving you a copy of the ledger that I believe coincides with this check. It said "James Ambuehl and expenses." Was what was the $8,100 for, if you can remember?

A I don't remember, and I don't see it on this paper that you

have here.

Q Right down (indicating) here, Check No. 2, dated May 27th, "James Ambuehl-expenses, $8100."

A Okay. I do not recall what the expenses would be.

Q There's another check there for $1,115. What does the ledger indicate that the check's for that's payable to James Ambuehl? It's check No. 1.

A It indicates fuel $315, labor and miscellaneous of $800.

LOAN AGREEMENT

The First American National Bank of St. Cloud (hereafter "Bank") has approved an operating loan to Steven and Barbara Radloff and Circle Sir Farms, Inc., in the amount of $30,000 (hereafter "Loan"). The loan is evidenced by a note dated 5/7/85 (hereafter "Note"), a copy of said note attached as Exhibit A.

The Loan was approved on the following terms and conditions:

1) The proceeds of the loan are to be used exclusively for the planting, harvesting and marketing of produce raised under the name of Circle Sir Farms, Inc. (hereafter "Produce Operation").

2) It is understood that management of the produce operation shall be vested in James Ambuehl. Further, that Steven and Barbara Radloff will cooperate full with Ambuehl in the management of the produce operation.

3) All advances from the loan will be deposited into the Country Fresh Produce, Inc. checking account. These proceeds may be drawn upon only by the manager of the produce operation to effect the purposes set forth in one above.

4) It is understood that all proceeds from the produce operation shall be paid over to Bank of application on the indebtedness of Circle Sir Farms, Inc. and Steven and Barbara Radloff.

5) Financial information pertaining to operation shall be provided to the Bank in such form and at such time periods as the Bank may require.

It is further understood and agreed that any breach of the foregoing provisions shall constitute an additional event of default under the note evidencing the loan. In the event of such default, Bank may, in its sole discretion, accelerate the then remaining balance owed under the note. A waiver by Bank of any one default shall not constitute a waiver of future defaults.

The First American National Bank of St. Cloud

By /s/ Donald E. Muller
Donald E. Muller
Assistant Vice President

The undersigned consent and agree to the foregoing as setting forth the terms and conditions under which the $30,000 loan is made.

Circle Sir Farms, Inc.

By /s/ Steven Radloff Dated 5-8-85
its President

By /s/ Barbara Radloff Dated 5-8-85
its Secretary

/s/ Steven Radloff
Individually

/s/ Barbara Radloff
Individually

/s/ James Ambuehl Dated 5-8-85

[Admitted through Defendants' Response to Plaintiffs' First Request for Admissions]

DEPOSITION OF ROBERT KALENDA

Deposition of Robert Kalenda, taken pursuant to Notice of Taking Deposition, and taken before Mary B. Wunderlich, Notary Public in and for the County of Stearns, State of Minnesota on the 8th day of March, 1990, commencing at approximately 8:52 in the morning, at the law offices of Hughes, Thoreen & Sullivan, 110 Sixth Avenue South, in the City of St. Cloud, Minnesota.

DIRECT EXAMINATION

By Ms. Didier:

Q. Mr. Kalenda, would you please state your full name?

A. Robert L. Kalenda.

Q And are you a resident of St. Cloud, Minnesota?

A I am indeed.

Q And you are an attorney licensed and practicing in the state of Minnesota?

A That is correct.

Q And for the period of time including 1985 to the present, a substantial part of your practice has been in the area of bankruptcy?

A. That is also correct.

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Q So your recollection is that someone in the firm indicated that there might be causes of action against the bank and that you should seek abandonment of them?

MR. PINOTTI: Objection, mischaracterization of the evidence. Go ahead.

A At some point in time that is probably the case, yes.

Q And would that have been a fairly short time, I mean in terms of weeks, prior to your contact with Sam Calvert requesting abandonment of those claims?

A Uh-huh. I believe that would probably be right.

Q Did you have any understanding at the time you requested abandonment of the claims against the First American National Bank as to what their value might be, potential or actual?

A Well, no, I don't think so. At that time I think that the -- the value of the claim for bankruptcy purposes would probably have been deemed to be somewhat speculative and difficult to quantify; and as a result of such, would be a minor matter as it relates to any value to the estate, because there would have been not -- that I was aware of anyhow -- specific cause of action frame, no litigation being done, no analysis that would give rise to a more definite and larger sum of money.

Q What about for purposes of the Radloffs, did you have any idea at the time you spoke to Same Calvert what the value of those claims might be to the Radloffs?

A Well, that's what I was just answering.

Q Okay.

A Really, I mean to the Radloffs and/or the estate, it would be the same. To me, it would be the value of the litigation or the value of the cause of action irrespective of who would receive it.

Q Okay.

A That would have been my focal point.

Q And was your understanding of the research that had done in your firm or the analysis that would have been done in your firm that it was extensive or minimal?

A I don't know. I don't have knowledge of that.

Q Other than what you've already described here today, did you have any further knowledge about those claims or causes of action as to the nature or the value or anything?

A Not that I recall.

Q And do you recall what you told Same Calvert about those claims when you requested that they be abandoned.

Q I don't recall any specific communication with Same Calvert, but I suspect it was very similar to the way we've described it here. I was not involved in the direct analysis of any causes of action; and at that point in time any causes of action were truly in there infancy, and I'm sure that I described them similarly.

Q That they were possibly of inconsequential value or of inconsequential value?

MR. PINOTTI: Objection. He's testified that there were in their infancy. Go ahead Mr. Kalenda.

A You know, at that point in time my concern was very narrowly bankruptcy; and it was an issue at that point raised that came to the surface for the first time towards the end of that case, apparently, as I recall. And my concern was to deal with it as would be appropriate in the context of the bankruptcy.

Q You are the person who contacted Sam Calvert and requested the abandonment of the claims?

A I believe I was.

Q Perhaps we should back up here a little bit and I

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property involved in this damage request the property that was involved with that $2500 lease extension or time extension in May of 1986?

A I seriously doubt that.

Q Okay.

A Unless I misunderstood your question. I believe that that lease -- that $2500 check, as I recall it, was for the extension of time for the First American Bank to utilize land, to utilize dirt, if you will. This piece, you know --

Q To remove their crops?

A To remove crowns, right, which was in the dirt, not a building or anything like that. To the best of my ability to review this, it would appear that we're talking about some other types of physical or personal property, cooling units, freezers, or air cooling unites and so forth, that, to me, does not relate to any extent with that other check or that other transaction.

Q Do you recall what this letter of October 14th, 1986, Exhibit 3 is about?

A Well, I think it speaks for itself. I was -- this statement that is attached to it, is, I believe, in Steve Radloff's handwriting. And I believe that he is launching a claim here or suggesting that the First American Bank has utilized some property that was rightfully his or that he had the rights to during that period of time. And it's asking the First American Bank to pay.

Q Well, what is this damages for rendering 36.2 acres of irrigated farmland unusable for the 1986 crop year?

A I don't know except to the extent that I know that the bank took it upon themselves to kill or attempted to kill the crops or the crowns that they were unable to remove from this real estate that we've been referring to connecting to this $2500 check. They were unable to remove that crop by the termination of the lease, and presumably, that means the termination of any extensions to that lease. And as a result of that -- or I don't know what the result was, but in any event, the evening or the day prior to the termination of their rights to that property, the bank attempted to kill the crop that remained that they were unable to take off the property.

It is conceivable to me that -- I know they sprayed the crop. They had an aerial spraying company engaged to do so, and it is conceivable to me that the land may have thus been

damaged for use that year because of the product that was sprayed on it. I know that there are residual effects on land and so forth. I do not claim to be knowledgeable of the chemicals or whatever that were used other than to state that this may very well be Mr. Radloff's claim as to the damage done to that land for that particular year because he was unable to use it. Like I say, the bank sprayed the crop the night before -- or the day or night before the lease expired.

Q Did Mr. Radloff advise you of that spraying immediately after it took place?

A Yes, he did; and I spoke with Mr. Kurt Schmidt on that point.

Q You did. And what did Mr. Schmidt tell you?

A Mr. Schmidt told me something to the effect that if we can't have the crop, nobody should have the crop.

Q Was there anything further said by you or Mr. Schmidt in that conversation?

A I wasn't very impressed with that particular decision on the part of the bank, to spray that crop. I thought that was a rather malicious at, and I'm certain that I told Mr. Schmidt what my opinion was of that act and asked him why he would do that. And, to the best of my recollection, he simply reiterated the fact that they didn't feel that Mr. Radloff should have the benefit of anything if they could possibly avoid it. And it was -- the bank felt that they had a right to do that if they wanted to. It was their land yet that evening, and they could do anything they wanted.

Q Okay.

A That's the extent of my recollection.

Q What did you feel was malicious about it?

A There, to me, seemed to be no useful purpose in spending, what I believe, to have been several hundred dollars to hire a

company to kill a crop for absolutely no purpose other than to make sure that Mr. Radloff didn't receive any benefits for what was left there after their lease expired. I can't imagine -- and Mr. Schimdt, I believe confirmed this, that there was not any useful purpose or any benefit to the bank. The bank could have left that property at midnight that night, and yes, there may have been crowns left in there that they had been unable to harvest; but instead of simply doing that, which would have, in any event, from a financial standpoint, saved the bank those hundreds of dollars, the bank took it upon themselves, knowing full well that Mr. Radloff was the successor as of the termination of the First American's lease to that property, to spend extra money for no other obvious or apparent purpose other than to make sure that Mr. Radloff didn't get that property with any greater value on it than was necessary. I can't imagine another purpose other than to make sure Mr. Radloff didn't receive any benefits. And I consider that to be a rather malicious intent. It certainly doesn't seem to be a very wise use of bank money.

Q Did the spraying, in fact, destroy the asparagus crowns?

A As I understand it did, uh-huh.

COUNTRY FRESH PRODUCE
CHECKBOOK LEDGER

BALANCE BROUGHT FORWARD $10,000.00

CHECK NO.	DATE	CHECK ISSUED TO	IN PAYMENT OF	AMOUNT OF CHECK
1	5/1/86	Wallace Wittwer	repairs	$ 150.00
2		Joe Kruschek	wages & exp.	876.26
3		Creameries Blending	fertilizer	1,665.00
4		Leonard Binkley	wages	494.90
. . .				
7	5/2	Otlund Chemical Co.	Farm supl.	978.00
8		Jim Ambuehl	prof. ser.	1,200.00

. . .

[Admitted through Defendants' Response to Plaintiffs' First Request for Admissions, Request 2, Exhibit C]

COUNTRY FRESH PRODUCE
SIGNATURE CARD AT FIRST AMERICAN

Signed by Jim Ambuehl on April 29, 1985.

[Admitted through Defendants' Response to Plaintiffs' First Request for Admissions, Request 2, Exhibit D]

AFFIDAVIT OF MICHAEL A. PINOTTI

Michael A. Pinotti, being first duly sworn, makes this his affidavit and states:

1. I am one of the attorneys in the above-entitled matter.

2. On April 12, 1990, Plaintiffs received Exhibit A attached hereto. [For testimony relating to the check, see A 98, ¶ 11 Supra.].

. . .

Michael A. Pinotti

Subscribed and sworn to on this 30th day of April, 1990.

EXHIBIT A

Check from: Check No. 1035

Radloff Farms 1 Date: 4-29-85

Amount: $10,000.00
Issued to: Country Fresh Produce
Signed: Steve Radloff

[Secretly endorsed by]: James Ambuehl

AFFIDAVIT OF MICHAEL A. PINOTTI

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Michael A. Pinotti, being first duly sworn, makes this his affidavit and states:

. . . .

2. Exhibit B is a true and correct copy of the opinion of Dale C. Dahl, Ph.D.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ Michael A. Pinotti

Subscribed and sworn to before me
this 23rd day of March, 1990.

/s/ Notary Public

EXHIBIT B

Dale C. Dahl, Ph.D.
CONSULTING ECONOMIST
1229 Sandy Lane
Monticello, MN 55362

Home: 612-295-4208 Office: 612-625-5778

March 22, 1990

Mr. Michael A. Pinotti, Ltd.
Attorneys at Law
Suite 830 Rosedale Towers
1700 West Highway 36
Roseville, MN 55113

Dear Mr. Pinotti:

In accord with your request of March 15, 1990, I hereby submit the following preliminary damage calculations in Radloffs v. First American National Bank, et. al. All Radloff valuations are made using an eleven percent (11%) discount rate. This rate is the estimated real rate of interest using one-half a percent above the loan rate as the appropriate farm investment rate less the average annual inflation adjustment in prices paid by farmers as reported by the U.S. Department of Agriculture

A. From your letter of December 29, 1989:

1. "Please give the present value as of August 1, 1990 of both the balance sheet and the projection."
    a. Balance Sheet: $1,148,987.50
    b. Projection: $6,384,699.50

2. Are the "financial projections for the Radloffs' property" mathematically "correct?" Yes.

B. From your letter of March 15, 1990:

1. Damage to Radloffs' pre-bankruptcy property interest based upon the pre-farm financial statement certified as correct by FANB." $6,384,699.50
2. "Damage to Radloffs' post-bankruptcy property interests in the bombed asparagus crops." $1,253,668.90
3. "Damage to Radloff's property interests in the land and crops they lost [as per] paragraph 29 of Affidavit of Steven I. Radloff dated January 9, 1989" $547,951.41
4. "How much money FANB lost relative to their pre-farm statement." $1,957,776.30 in 1990 present value at 15% discount.
5. "Economic impact that FANB's destruction of Plaintiffs business had on the community."
    a. Loss of $18,295,000 in nominal wages paid to area labor to 1999.
    b. Loss of multiplier of 1.5 of input purchases by Mr. Radloff during all future years.

My expanded analysis and final opinions will be forthcoming.

Sincerely,

/s/ Dale C. Dahl

Dale C. Dahl, Ph.D.
CONSULTING ECONOMIST
1229 Sandy Lane
Monticello, MN 55362

Home: 612-295-4208 Office: 612-376-8795

June 12, 1990

Mr. Michael A. Pinotti
Attorney at Law
Suite 830 - Rosedale Towers
1700 West Highway 36
Roseville, MN 55113

Dear Mr. Pinotti:

Re: Radloff v. First American National Bank, et. al.

As per your request of April 3, 1990 I sent you the discounted net present value as of August 1, 1990 of the Radloff's loss regarding their net worth calculation; the March 1985 proforma analysis calculation certified as correct by FANB; the loss resulting from the bank's bombing of Radloff's asparagus crop; and interference with their right to purchase the MONY land on April 12, 1990.

Since them, you requested that I make an independent verification of the yields, prices, costs, and methodologies used in the initial estimation of damages. Also two major requests made in your letter of April 3, 1990 are still outstanding: (1) to render an opinion about possible market restraints for vegetable produc-

tion in Minnesota and (2) to modify, amend, or add to the methodologies used in the loss calculations if there is a need to do so.

In this report, I addressed these issues and provided amended estimations of the type requested. As I told you, this additional material does not constitute my final opinion on damages in this matter. As new information becomes available, I will adjust my estimates as needed.

Sincerely yours,

/s/ Dale C. Dahl

Therefore, Radloffs' net worth would be as follows:

b) If the Radloffs' were paid their net worth on 3/25/85 and quit farming, they could have simply invested their net worth in long-term government bonds. As part the calculation made on April 12, 1990, their net worth on August 1, 1990, would have been as follows:

At market interest rate	$1,045,317
At average market interest rate	$1,042,566

Please refer to page 7 of the April 12, 1990 estimation by Dale C. Dahl.

2) Amended Projection for Bombed Asparagus Nursery

1) The bombed asparagus nursery of approximately 36 acres was enough to provided crowns to establish 250 acres of asparagus in 1986.

2) Yields, prices, and costs are as discussed above in the text.

. . . .

Using the same market interest rate as in (a) above, the net present value of lost net profits (1990) would be $514,030.

3) Amended Projection for the 154 Acre MONY Farm

The loss associated with the interference of the bank in Radloffs' right to purchase this piece of land from MONY and the associated mitigation scheduled are presented in Table 22. The major assumptions of the projection are as follows:

. . . .

Under these assumptions, the loss would be fully mitigated by 1997. Using the same market interest rate as above, the net present value (1990) of lost net profit from the farm would be $406,595.

. . . .

The lost net profit for the enterprise was adjusted for the following items:

i) Value of the bombed crowns which was estimated at $177,195 using the per acre costs for crowns ($708.75 per acre) used in the Ford and Benson study.

. . . .

b) Assume the bombing of the nursery and Radloffs' loss of their net worth and credit worthiness are related. Then, they would be able to start mitigating their losses after they recover their net worth and their credit worthiness is re-established. . . .

. . . .

The adjusted lost net profit was compounded/discounted using market interest rate. The results are shown in Table 25. The net present value (1990) of the lost profit (damage) from not being able to implement the project would be $3,058,580.

DEPOSITION OF STEVEN I. RADLOFF

Deposition of STEVEN I. RADLOFF, taken pursuant to Notice of Taking Deposition, and taken before Mary B. Wunderlich, Notary Public in and for the County of Steams, State of Minnesota on the 18th, 19th, 20th, and 27th days of December, 1989, commencing at approximately 10:10 in the morning, at the law offices of Hughes, Thoreen & Sullivan, 110 Sixth Avenue South, in the City of St. Cloud, Minnesota.

[5]

Q Okay.

A If there was more to answer.

Q And, as you know, you need to respond audibly so the court reporter can take your message. If you have any questions, if you don't understand what I'm asking you, ask me to repeat it, because it's important that your response is, in fact, the response that you intend to give.

A Yes.

Q What is your address, Mr. Radloff?

A Route 1, Box 159, Little Falls.

Q And what is your educational background?

A I graduated from Hector High School.

Q What year was that?

A In 1967. Went on to a two-year program in Willmar Vocational School in a course called Agricultural Supplies and Technology; and then I want on to work toward a degree in agronomy at the University of Minnesota.

Q Did you receive a degree in agronomy?

A No.

Q And how many courses did you take or credits did you take towards that degree?

A I have 16 credits left.

Q Are you working on that degree right now?

A I haven't had the -- the economic wherewithal to complete that.

Q When was the last time you took courses?

A Probably in 1972, probably.

Q Now, what courses did you take to get your degree in agricultural supplies and technology?

A They were basically -- their program was designed for people that wanted to do management in either production agriculture or along the lines of elevator management or that type of thing.

Q So what sort of courses did you take?

A Okay. We had some production courses from the standpoint of production agriculture.

Q What is production agriculture? I'm sorry.

A Just how plants and animals and so forth, how they're to be managed or they're to be fed, whether it be a plant or an animal, and caring for them and harvesting the crop or selling the livestock and -- and then also we had some accounting.

Q How many courses in accounting?

A I believe there were either one or two. I don't know.

Q And what other courses did you have as part of your agricultural supplies and technology degree?

A It was a range of subjects like letter writing or

[8]

agronomy or our major that we had -- like in -- the ones I can remember, we had some plant breeding and genetics, soils. I guess there's probably a number or more; but, again, I guess it's been enough years that I'd have to kind of sit down and -- and look through what courses I had taken.

Q Did you have any management courses?

A I don't believe that we had anything in college that was specifically geared at management. It was more along the lines of technical agronomy, to be an agronomist.

Q Did you have any business or accounting courses?

A Not that I remember. They were probably the only accounting -- formal accounting we had was back in vocational school.

Q Have you had any other formal education?

A No.

Q What is our wife's educational background?

A She's a graduate from Mankato State with degree in Home Economics.

Q And what year did she graduate? You can estimate this.

A Let me see. I think she graduated in '71.

Q Now, have you attended any seminars or training related to your agricultural work?

A Well, I'm sure I had taken some, gone to meetings put on by industry, fertilizer or chemical industry.

Q Did you attended any trainings regarding asparagus?

A No, I don't think there was any specific training in regards to asparagus. We went to some meetings where they may have talked about vegetables with -- in which asparagus may have been included in the agenda.

Q And when were those meetings?

A In the period of '82 through '85.

Q And how many of those meetings were there?

A Maybe one a year.

Q Where did they take place?

A University of Minnesota, I think, had an annual vegetable growers meeting, and that would have taken place on the St. Paul Campus.

Q Was that with the Minnesota Vegetable Growers Association?

A Yes.

Q And what sort of information could be obtained at those meetings?

A Oh, they talked a little bit about all fruit and vegetables crops, just a brief review of what was new in the industry; and talked a little bit,

[18]

Q Is it Mr. Southerland or Dr. Southerland?

A I think it's Mister.

Q What other people did Mr Southerland refer you to?

A Well, there's some -- there were some people growing asparagus within our state and there's people out on the West Coast growing asparagus.

Q Who are the people in Minnesota?

A The ones that I know of, there is Lowell Schwietzers, Don Sumners.

Q How do you spell Sumners? S-u-m-n-e-r-s?

A I think so.

Q And the first name was Lowell Schwietzers; is that correct?

A Yes.

Q Where's Don Sumners?

A Up in Staples.

Q And any other people in Minnesota?

A There are others, but I don't know their names.

Q And how about people on the West Coast? Did you receive any names or do you know of any people there who grow asparagus?

A Yes. There's several out there. I guess the only -- the only name I know out there is Green Giant. That's a large asparagus operation.

Q And where's that located?

A In Washington state.

Q And who was our contact person there?

A I can't remember the guy's name anymore. he was out in Washington.

Q And the Green Giant operation in Washington state was the only one you remember?

A Well, there were -- there were several operations I look at. I was out there and looked at the operations and talked with the growers and the people out there. But I guess I have forgotten the individual farmers, other than I remember Green Giant was out there.

Q Where were they located, the other farmers?

A In the same general area in Washington. They were all in Washington state.

Q Did Mr. Southerland give you any other names?

A He gave us some -- some market contacts.

Q And what do you mean by "market contacts'?

A People who were interested in buying our produce.

Q and what names were those?

A I had a contact in Florida, the one that we visited, and had a market -- tentative marketing plan set up with was -- it's called Reds something.

Q And where in Florida is that?

A It's in Orlando.

Q Orlando?

A Uh-huh.

Q Do you remember the address?

A No. I can get it for you.

Q Now, you had a tentative marketing agreement with Reds?

A Uh-huh. They were up to our farm.

Q The were up in what?

A They were up to our farm and visited our farm.

Q When did they visit your farm?

A In 1984.

Q What time of year?

A In the summer, the growing season.

Q In July?

A It may have been. I'm guessing it was -- if I remember right, we had peppers that were just starting to harvest and that would have had to have been in late August.

Q Now, you mentioned a tentative marketing agreement. Did you ever actually market produce or products to them?

A No. The farm was taken away from me before I could accomplish that.

Q Was this for the 1985 growing season?

A Well, we didn't have any specific contracts with them because we were never able to come up with a positive planting plan for 1985; but they had expressed an interest in buying vegetables from us, particularly asparagus.

Q In the 1985 season?

A In the future. You know, they didn't -- the didn't specifically say 1985. They just said that they were interested in securing our produce in the future and, again, they sent a man up from Florida.

Q Now, why didn't they buy from you in 1984?

A We didn't have enough volume for them, and we just had made the contact in the fall of 1984.

Q What sort of volume were they looking for?

A Well, at that time we had 200 -- about -- approximately 200 acres of asparagus planted, and they felt that as that crop continued to grow and produce in the upcoming years that they -- they could handle all of that asparagus production.

Q Who did you sell to in 1984?

A 1984 was just a light harvest because it had just been planted. It was sold to the area stores and some of it was sold through the -- through the building there to people stopping from the highway.

Q Did Reds discuss prices with you?

A No. They just -- they just made the comment that whatever -- wherever the market was at from the standpoint of -- at that time of the year that they would -- they're normally buying their asparagus out of California, that they'd be willing to pay us whatever -- whatever they were having to pay California and that we were a little closer than California, so that our net would be greater than that coming out of California.

Q Because you would pay the shipping?

A Well, yeah. The shipping has to come out of on one end or the other, but our shipping rate would be a little bit less than California.

Q Did Jim Southerland put you in contact with any other market contacts?

A Yes

Q And who were those?

A International Multifoods.

Q And did you speak with them about any possibility of selling them produce of any sort?

A Yes, we did. We had a series of meetings with them in which they were interested in becoming involved with our operation.

Q What do you mean by "interested in becoming involved"?

A They were interested in us growing for them, and they would be doing the marketing of a large asparagus operation.

Q Were they interested in purchasing any of your property?

A No. Our negotiations were that they would -- they would

become involved in, like our other limited partnership, becoming a limited partner and becoming involved in the ownership or a portion of the ownership in the asparagus crop.

Q When did they indicate that interest?

A In the spring of 1985.

Q Had you spoken with them about this prior to that?

A No. Negotiations began early in '85.

Q Do you mean in January of 1985?

A I'd have to go back and find the exact date when we started; but, yeah, I would say probably January or February of '85.

Q Did Jim Southerland help you with these negotiations?

A Yes, he did.

Q Did he help you with the negotiations with Reds?

A He helped us make the initial contact there; and if i'm not mistaken, he may have been along when they visited our operation in '84.

Q Were Bob Kalenda or Mark Kalla present at any of the meetings with International Multifoods?

A No.

Q Now, why didn't International Multifoods purchase a partnership interest?

A Because we were put out of business in the spring of 1985.

Q And how did they find out about that?

A Well, I had to cease going to meetings with them because I no longer hand any control over my operation.

Q When had they indicated that they would be interested in the limited partnership?

A Probably our last meeting with them was in the middle of April.

Q And what were the terms of the limited partnership that they were willing to agree to?

A Pretty much similar to the limited partnership in Radloff I.

Q Radloff I, is that what you said?

A Yeah, that's a limited partnership.

Q And is the I on Radloff I a Roman numeral?

A. Yes.

Q Now, which property would have been involved with this proposed limited partnership?

A Our negotiations were that they were going to start with 500 acres of asparagus that we would be planting, and our proposal on that was that it was going to be going on some other land that I owned.

Q And where would that be?

A It would have been north of Little Falls.

Q In what township?

A Ripley.

Q In Ripley Township?

A That's correct.

Q And what section of Ripley Township?

A I think it lies in 13, 14, and 24.

Q And this was 500 acres total?

A Yes.

Q And did you own the property in fee simple in Ripley Township, Sections 13, 14, and 24?

A It was on a contract for deed.

Q And who were you purchasing it from?

A Nelsons, Gregory and Mark Nelson.

Q Who owns that farm today?

A My father bought it from them.

Q Have you spoken to International Multifoods since your father bought the farm?

A No. The asparagus plants that we had designated to plant

there were dug and/or destroyed by the bank.

Q Where did you plan to obtain the financing for the operation of the limited partnership with International Multifoods?

A Through International Multifoods. It's the same as the -- same as the -- or a similar situation as with Feddermanns and Radloff I.

Q Was there a proposed name for this second limited partnership with International Multifoods?

A No.

Q Did Jim Southerland put you in contact with any other marketing contacts?

A Yes.

Q And Who was that?

A Seneca Foods.

Q And what is their location and address?

A There were two men that flew in from -- I believe they were from Eastern Wisconsin. I don't know that address.

Q Was it Milwaukee?

A I don't know. I'm pretty sure. I may have their cards. All of them are contacts. All of our -- we had quite a list of things that we were going with and all these thins like this were taken from my office when it was broken into in the fall of 1985. So there's a lot of -- a lot of those names and addresses that I lost.

Q But you do have those cards?

A I don't know.

Q You may?

A I may.

Q Well, what were the --

A Sometimes I got --

Q --names of those two men?

A I don't remember now but their -- Seneca Foods is -- if I'm not mistaken -- based out of New York. They came up, looked at our vegetable operation, and, particularly, they were interested in the asparagus. Their decision at that time was that they were going to wait. You know, they expressed an interest, but they weren't ready to make a move right a that time and they were there in the fall of 1984, I'm guessing, like September.

Q And you don't remember their first names or last names?

A I want to say one name is -- first name was Jim something, but I can see if I might happen to -- sometimes I kept a duplicate of their cards, you know, their business cards.

Q Now, who were your contacts at the International Multifoods?

A I'm pretty sure I have those cards or those people. Again, in all -- a lot of my notes and preparation for that was taken from the office; but I might have their card. If not, maybe I can see if I can call down there and locate them.

Q There were four or five meetings you had with them?

A Yeah, some of them were on the telephone.

A And where were these people located?

A In Minneapolis. They were in the -- is there an International Multifoods building in there?

Q Probably. I don't know.

A I think so.

THE WITNESS: Is there?

MR. PINOTTI: Yeah.

A. Yeah, that's where it is. It was on one of the upper stories there.

Q Do you remember what their positions were?

A One of the men we were meeting with was in charge of all production, because we were having a hard time making

connections with him because he was out of the country a lot. They had a large vegetable operation in South America, and he was down there a lot. The other man, I believe his position was the C.O. for that division.

Q For what division?

DEPOSITION OF NEAL R. GOPLEN

The Deposition of Neal R. Goplen, taken pursuant to Notice of Taking Deposition, taken before kelly L. Anderson, a Notary Public in and for the County of Hennepin, State of Minnesota, taken on the 29th day of June, 1989, at 1700 West Highway 36, St. Paul, Minnesota, commencing at approximately 7:00 p.m.

NEAL R. GOPLEN,

the Witness in the above-entitled matter after having been first duly sworn deposes and says as follows:

CROSS-EXAMINATION

BY MR. PINOTTI:

Q. Please state your full name for the record, please?

A. Neal Richard Goplen.

Q. Where is your current residence, please?

A. 16 Sunnyhill Boulevard, St. Peters, Missouri 63376.

Q. And your current employer?

A. Mutual Life Insurance Company of New York.

Q. Do they go by the acronym Mony, M O N Y?

A. Yes.

Q. Is that a trade name or trademark?

A. I guess you could consider that. Right now it's Mony Financial Services is really what most of the offices run under.

Q. When did you start working for Mony Financial Services?

A. June or July 1984.

. . . .

Q. Did you have other personal property like equipment or crops or cows or something like that?

A. Well, our security agreement would take into affect any irrigation equipment that had been on the place when the loan was

made. It's an encompassing security agreement, so it's got a thereafter acquired clause, so if equipment is added it technically does belong to Mony subject to any liens of subordination that we may have given. Just general law, I guess.

Q. How about crops, how did you view the security interest you had in the Radloff property as it relates to crops?

A. Again, I have not researched the mortgage in this particular case, but in a normal course our UCC plan mortgage does take a security interest in crops. It usually is not for the purpose of putting crops inputs out, so we don't make a claim to the crops that allow any bank institution to secure that growing crop that particular year, and never enforce any claim that may be in our security agreement.

Q. As it relates to the Radloff property, do you recall whether or not you had exerted at any point the right to those crops?

A. No, we did not.

Q. You don't remember that?

A. Not formally. I would say that, you know, when it comes to crops in that particular instance you're probably talking just the asparagus crop which was planted and would be --

Q. A perennial crop?

A. Perennial that would have been there upon our acquisition of the property. As to any other year-to-year crops, no, we would not have.

Q. As part of your normal business routine, did you ever make a trip to Mr. Radloff's land?

A. Yes, I did.

Q. Do you recall when those trips occurred?

A. 29th day of April 1987 was my first trip up there as a Mony employee. I was up there prior with Bell.

Q. Going back to your 4/29/87 trip, do you remember having conversations with Steve at his property, Mr. Radloff, at his property?

A. Yes, I did.

Q. What was discussed, please?

A. Do you have the date of the foreclosure sale?

Q. Your meeting was after the foreclosure sale, is that what you're saying?

A. I need to find a date of the foreclosure sale to get my memory refreshed. Foreclosure sale took place January 21, 1987. I was up there in April, farm was subject to one year redemption and we were not in possession. I was up there to inspect and see what our position was security wise and value wise, and during that trip I met with Steve to see what his future plans were. I remembered him giving me a tour of the property, I think just the north property at that time, and I discussed if there was any interest on his part in trying to redeem the mortgage.

Q. You have a report there --

A. Yes.

Q. -- that you wrote out? We'll ask you to read that later, but I want to get into some other questions. Did Mr. Radloff at any of these meetings indicate that the crops on his land near his homestead had been sprayed with herbicide?

A. Yes, he did. We were out driving around and we drove by the asparagus crop that I do remember him stating had been sprayed.

Q. Do you recall whom he thought sprayed it?

A. My recollection was that he said the bank -- First American Bank had claimed an interest in it. His comment to me was that the bank had had it sprayed.

Q. By it you mean the asparagus crop?

A. Yes.

Q. I have to do that sometimes to make it clear on the record.

MR. PINOTTI: Will the Court Reporter mark this as Number 2?

. . . .

[W]e took these Exhibits out of his file today?

MR. HUGHES: That's agreed.

BY MR. PINOTTI:

Q. With that stipulation in mind, Mr. Goplen, these documents are records you normally keep in the business you run for Mony Financial Services?

MR. HUGHES: We waive foundation.

A. Yes.

BY MR. PINOTTI:

Q. Exhibit Number 3 is a report from Ed Ruthardt? Second page it has his signature on it.

A. Correct.

Q. Who is Mr. Ruthardt?

A. Ed Ruthardt is an individual working out of Robbinsdale, has been -- right now is under contract with Mony to manage all our acquired properties in the states of Minnesota and Wisconsin. Also any properties we put on the market to liquidate we list with Ed as he's a broker in both states.

Q. So he's not an employee, but is an independent contractor of Mony?

A. That's correct.

Q. And the rendition of his services is he normally gives you reports such as the one evidenced as Goplen Exhibit Number 3?

A Yes.

Q. And then Goplen Exhibit Number 4 that's a letter from

Paul Mier to Faegre and Benson, law firm in Minnesota. Paul Mier again is the person who you succeeded or replaced?

A. Right.

Q. Number 5 concerns sale of property?

A. Correct.

Q. Could you please describe what property is being sold there, not the legal description but in common language?

A. We were looking at selling the redemption right in the total property acquired at sheriff sale. The bank was interested in purchasing a sheriff certificate on the southern track of that farm.

Q. You have Goplen Exhibit 2 in front of you and on the second page a picture of the building that's on the southern farm again, right?

A. Correct.

. . . .

Q. Number 8 is a letter from your attorneys concerning what, sir?

A. When we had the sheriff sale Steve Radloff had asked that the northern track be split into separate parcels, claiming the homestead right under the Minnesota statutes. So we ended up splitting the northern track on our bidding process at the sale, and the south track was bid in also separately as one track, and the letter was just going over the sale situation, and it was regarding the Radloff's repurchase of the certificate on the north track --

Q. I think that's fine, sir. So essentially you split the property; had the north property and the south property, and the north property was split again into two parcels?

A. Correct.

Q. Exhibit 9 is a letter you received from First Farm Corporation, Incorporated?

A. Correct.

Q. Did you understand that First Farm Corporation is the subsidiary of First American National Bank of St. Cloud?

A. All the correspondence was either from Mike Leonard or Curtis Schmidt. I never knew exactly how First Farm was established. I wasn't in tune to it, but I knew it was overseen by the bank.

Q. You knew that Mr. Schmidt worked for the bank?

A. YES.

Q. And you knew that Mr. Leonard worked for the bank?

A. Yes.

Q. And the next Exhibit is Goplen Exhibit 10?

A. Correct.

Q. And that's the letter in which Mr. Radloff bid on the property?

A. Correct.

Q. And the bid is for the south property?

A. Correct.

Q. Exhibit 11 is the letter you explained to Steve why you did not accept his bid even though his bid was more than First Farm's bid?

A. Correct.

Q. Exhibit 12 is a letter to Curt Schmidt telling him that you accepted his bid?

A. Correct.

Q. Exhibit 13 is another report from Mr. Ruthardt?

A. Correct.

Q. Do you, Mr. Goplen, in the business of running or managing distressed property for Mony Financial Services, have you ever run into the occasion of having to deal with perennial crops?

A. Yeah, we do on the west coast.

Q. What situation are you involved in out there?

A. We have a number of vineyards, almond groves in California, and in the state of Washington we have apples cherries and we do have some asparagus.

Q. Is it normally part of your mortgages to include a lien on those perennial crops?

MR. HUGHES: That's objected to as irrelevant.

BY MR. PINOTTI:

Q. Would you answer that, please?

MR. HUGHES: You're without counsel. You may proceed or not proceed as you wish.

BY MR. PINOTTI:

Q. That is correct.

A. Yes, we do.

. . . .

BY MR. PINOTTI:

Q. You normally take that position in the course of business when you're dealing with perennial crops, was that your understanding?

A. Our mortgage is encompassing.

MR. HUGHES: Objection. Usually take what position, Counsel?

MR. PINOTTI: That perennial crops are considered part of their security interest.

A. I guess first off we have really one mortgage. We don't have a mortgage that differentiates between permanent planting and row crop. Our clause is in the mortgage we do in Minnesota on crops would be basically the same type mortgage in Washington but to be practical it's definitely more important to make sure those clauses are included out west.

BY MR. PINOTTI:

Q. You apparently had asserted that right on the Radloff crops, in particularly the asparagus, is that true, at least informally?

A. Informaliy, yes.

Q. Mr. Radloff conditioned his bid on obtaining those crops, correct?

A. Correct.

Q. And that bid is evidenced again by Goplen Exhibit Number 10. And then you wrote him a letter basically saying you were unable to guarantee that the crops will be remaining on the farm once the redemption period ends, correct?

A. Correct.

Q. Did you take into consideration in making that decision the conversations you had with Mr. Radloff on or about 4/29/87 and the farm field report of Mr. Ruthardt of July 18, 1986? [Goplen Ex. 3].

A. Yes, I would. I think there's a couple items there. We had been told by the bank that they were definitely claiming the ride, and the asparagus would not be there if we were to acquire or someone else was to acquire that property. They had UCC's on record to show ownership and that they would take the crop.

On our part it comes into practicality as to trying to make the claim. To make a claim, which we did research to some degree informally through conversation with our attorneys, as to saying that our security claim was valid and that we could go after it. I was counselled that could take considerable time. We'd probably have to get a receiver. We would probably have to end up either finding a tenant or taking care of it ourselves with a court order and, you know, being practical with the Minnesota statute we were not going to ever get into a situation of directly managing a farm in Minnesota, which is somewhat contrary to the state regulations

for a corporation to farm. Not knowing if I could find a tenant or if I wanted to go into tenancy on that type of crop, it was not really to our advantage to pursue making a claim. From our knowledge on the west coast of directly managing and putting inputs in an area where asparagus isn't overall the normal, really didn't want to take the risk of putting the money out to protect the crop.

MR. PINOTTI: I have nothing further.

. . . .

GOPLEN EXHIBIT NO. 3

FARM FIELD REPORT

MONY # 11098 July 18, 1986

To: Paul Mier
David Beadle

I arranged and held a meeting at 1st National Bank, St. Cloud, Minnesota. Met Mr. Michael Leonard, Ag. Loan Manager, Mr. Curtis Schmidt, Council. Bank has lease for 86 from Calvert. Stated they subleased to James Ambuehl. . . .

Bank has purchased land from Calvert that was adjacent to MONY security, not part of this farm. Was owned by Radloff. Had asparagus crop. Bank as acquired 2 additional land units in area.

. . . .

Leonard and Schmidt very aggressively pressed for a near term lease. Leonard even stated they had already made plans to chemically burn off plants if no lease could be arranged. Very strong position to take considering they had originally asked for 3 year lease. . . .

Traveled to farm. Met with Ambuehl and inspected MONY equipment, took photos. Ambuehl in my opinion is really an employee manager not owner operator. Have not harvested raspberries and could not get an answer so to why not harvested. He also stated urgency for lease or he would burn off asparagus, raspberries and strawberries. Bank acquired other tracts and has planted asparagus [sic] crowns. Could not determine lease payment schedule.

. . . .

Report respectfully submitted,
/s/ Ed Ruthardt

GOPLEN EXHIBIT NO. 9

FIRST FARM CORPORATION, INC.
110 West St. Germain Street
St. Cloud, Minnesota 56301

July 15, 1987

Mutual Life Insurance
of New York
16216 Baxter Road
Suite 250
Chesterfield, MO 63017-0877
Attention: Mr. Neil Goplen

Re: Part of the S-1/2 of Section 22 ,Township 39, Range 32, Morrison County, Minnesota (Radloff Foreclosure)

Dear Mr. Goplen:

. . . .

Be advised that First Farm Corporation claims ownership of all crops located on the real estate. Consequently, if First Farm is not the successful bidder in the purchase of the Sheriff's Certificate, it will take such action relative to the crops consistent with its ownership rights.

. . . .

Sincerely yours,

Curtis M. Schmidt
Chief Financial Officer
612-255-7189

GOPLEN EXHIBIT NO. 11

July 23, 1987

Mr. Steve Radloff
Route 1, Box 159
Little Falls, Minnesota 56345

RE: MONY FRE #11098

Dear Steve:

This is to inform you that your bid of $80,000 to purchase our interest in the share of certificate on land near Royalton has been declined. A better offer has been accepted for the buy out of our interest. Your offer of $101,000, which included crops remaining in place, was not accepted for the following reasons: As it has been conveyed to us that the bank will claim all interest in growing crops on this partial. Also the bank or its assign are in possession of the property during redemption by means of a purchase of the redemption right from the bankruptcy trustee. With these two things in mind, we do not feel that we can guarantee to you that the crops will be remaining on the farm once the redemption ends. We have been informed that they will take action on the to the crops consistent with their ownership rights, be they what they may. We do not feel that it would be in our interest to pursue this matter. We regret that this decision has not been made in your favor but as per the terms of the previous letter from me regarding the criteria for bidding, both parties were on equal grounds. The

only problem with your higher bid was that we cannot guarantee that the crops stay with the land and that the plantings will be there at the end of redemption.

If you have any further questions, feel free to give me a call.
Sincerely,

/s/ Neal R. Goplen

Neal R. Goplen
Director of Agricultural Investments

NRG/vrw

GOPLEN EXHIBIT NO. 13

December 30, 1987

FARM FIELD REPORT

SUBJECT: Radloff, FRE11098
Little Falls, MN

OBJECTIVES:

1. Closing on partial assignment
   a. First Farm Corporation

. . . .

1. Met with Curtis Schmidt, November 9, 1987, attorney for the First Farm Cooperation. Exchanged the partial assignment of the Sheriff's Certificate of Sale for $80,000.00. The recording and tax payments to be handled by First Farm and a copy forwarded to Clara Crosby. Transmitted [sic] the $80,000.00 certified check to St. Louis.

. . . .

The terms and conditions of the transfer of ownership to the Radloff family was greatly appreciated, Neal.
This report respectfully submitted,

/s/ Ed Ruthardt

Ed Ruthardt
ER/tm
cc: Charles Horn
Faegre & Benson

[Excerpts]

PLAINTIFFS' MEMORANDUM
OPPOSING DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT

E. Estoppel is unavailable to Defendants.

Either equitable or judicial estoppel is not available to Defendants since they have come to this court with unclean hands. They benefitted by forcing Radloffs into bankruptcy and they committed unlawful and criminal acts.

1. FANB has recouped approximately $360,000.00 of its losses. (EF No. 56). There was no detrimental reliance upon anything.
2. FANB wanted, planned, and forced the Radloffs into bankruptcy. Pursuant to the Radloffs' statements and their own handwritten statements of Mr. Leonard that confirmed Radloffs' statements, FANB had for several months prior to the bankruptcy intended to force the Radloffs into bankruptcy. (Tab G, Ex. 6-13).
3. The Defendants deceived Radloffs out of their rightful advantage in the May 8, 1985, agreement.
4. The Defendants violated Federal law under 18 U.S.C.S. § 1951, by threatening Radloffs with bankruptcy and criminal acts.
5. The Defendants violated the Bank Holding Act.
6. FANB conspired to take over Radloffs' business, which violates Minnesota's restraint of trade law.
7. FANB again violated the state restraint of trade law by bombing the crops.
8. They have ratified all acts of Mr. Leonard, Mr. Schmidt, all FANB employees, and Mr. Ambuehl that occurred

prior to bankruptcy, by their purchase of any rights the bankruptcy estate still owned to sue these persons, when FANB solicited and then consummated the August 1988 purchase.

Defendants come to this court with unclean hands for both prebankruptcy and postbankruptcy actions. The prebankruptcy matter concerns two central claims that Radloffs have against Defendants: (1) The wrongful dishonorment of the two checks, one to The Mutual Life Insurance Company of New York (hereinafter MONY) (Exhibit F1 & F2 to Appendix for Punitive Damage Motion), and the other one to Ford Motor Credit Company (hereinafter Ford) (Exhibit F3 & F4 to Appendix for Punitive Damage Motion); and (2) FANB's coerced agreement as evidenced by the May 8, 1985, agreement (Exhibit G-1 to Appendix for Punitive Damage Motion) that violates both federal and state civil law.

As to postfiling activities, Radloffs' claims relate to the bombing of the asparagus upon which Radloffs claim both property, the duress exerted by the threats made to Mr. Radloff, and the very real threat to again bomb the asparagus crops of 1987 if Radloffs won the right to purchase the real estate from MONY. Any one of these rights is sufficient to defeat Defendants' claim for equitable relief from this court.

[Excerpts From Appellants' (Farmers') Brief
to the Minnesota Court of Appeals]

Both Mr. and Mrs. Radloff come from historical farm families residing in Hector, Minnesota. Appx p. 133-135. Mr. Radloff studied agronomy at the University of Minnesota. Id. He worked in the agronomy field at a Hector feed mill until 1974, when they decided to start a farm operation in Little Falls, Minnesota. Id. From 1974 to 1982, Radloffs raised dry edible beans. (PTA v. I, Tab A, ¶ 3).[3] In late 1982, they changed to fresh vegetables, including 15 to 20 year perennial asparagus crops. (Id). After this change, the Bank controlled Radloffs' operation (Infra p. 13-17) and eventually forced them (through latent fraudulent activity) into bankruptcy. (Infra p. 18-21).

Radloffs were able to keep ownership and possessory rights to the asparagus crops that were located on their "home farm" (located in Green Prairie Township) after their bankruptcy petition was filed. (Infra p. 27-32). Bank obtained a lift stay order partially lifting the (usual bankruptcy) injunction, but this order did not go any further. (Bank Ex. A, Item 12).[4] In other words, this order did not authorize a sale or any replevin action by Bank. Id. Radloffs have never consented to a sale of any of these perennial crops. (PTA V. III, Tab 1, Aff. Radloff ¶ 13). Bank did not purchase these crops (Id.) or attempt to purchase them before they

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[3]"PTA" refers to plaintiffs' trial appendix and "V" refers to volume, divided by tabs, and the remainder refers to an affidavit by Mr. Radloff. Tabs A-K are located in Radloffs' trial appendix Vol. I, Tabs L-XYZ are in Radloffs' trial appendix Vol. II, and Tabs 1-10 are in Radloffs' trial appendix Vol. III.

[4]Refers to Exhibit A of Bank's trial appendices.

were severed from the real estate. (TSJ p. 91).[5] No court has ever authorized a severance of these crops, (Id.) except to the limited extent the Bank had a 25 acre lease which was a signed stipulation between the parties. (Bank Ex. A to Item 24). However, that 25 acre lease expired on May 15, 1985, thereby conveying to Radloffs the bargained for reversionary interests. (PTA V. II, Tab Q, Depo. pp. 75-65). At all times material, Radloffs' maintained lawful possession of their home farm. (Infra. p. 27-31).

....

2. Threat to physically harm Mr. Radloff. After the "No Trespassing" signs were posted, Mr. Ambuehl, then Bank's authorized agent (Appx. pp. 70-76), threatened Steven Radloff with harm. Id. Barbara Radloff's testimony concerning this subject on page 26 of her deposition dated April 5, 1990, was as follows:

> A That was the morning that Steven went out and found the men on the property to take the asparagus crowns and he came back in the house and told me about it and then he received a phone call. And he was talking about -- 'well, he had the legal right to the property and that he should talk to his attorney and' -- anyway, when he got off the phone, he had kind of a funny expression on his face and I asked him what was the matter and he said that it had been Jim Ambuehl and he said he wanted the asparagus crowns and Steven had told him that it was -- that he had the lease on it and they were legally his and then Jim had threatened

---

[5]Refers to the Transcript of the hearing on Bank's motions for summary judgment on July 11, 1990.

him and said that if he didn't let him have the asparagus crowns that he was going to take care of him.

As a result, Bank coerced Radloffs to accept a $2,500.00 payment to extend their 25 acre lease on May 22, 1986, or again forfeit Bank's their rights. (Ex. G. DRP1 Admin.; PTA V. I, Tab 28, Aff. of Kalenda ¶¶ 4-5; PTA V. II. Tab Q, Kalenda Depo. pp. 75-76).

. . . .

5. Bank's motive was to destroy a competitor. Bank's motive behind the predatory crop bombing was anti-competitive, expressed as follows (Leonard Depo. p. 181, emphasis supplied):

Q What were your reasons for applying the herbicide to these crops?

A We were in the asparagus crown business, and we were selling -- the bank was selling the collateral proceeds of which we had purchased in the bankruptcy court. And we did not want to leave the crops so that someone else could take our market and sell the crops.

Q What was so wrong with leaving the crops for Mr. Radloff to farm?

A As I indicated, we were selling crops, marketing them, and that we did not want other people to be marketing the crops that were ours.

. . . .

Q But they were located on land right next to Mr. Radloff's house?

A Whatever - wherever they were, they were. I mean, if it's right next to his house, you'd have to

go and see what -- if you crawl right next to his house.

Again, on direct examination (Id., p. 239), Mr. Leonard confirmed that Bank's premeditated motive was to injure Radloffs' rights in the market place.

Q Is it possible that you did purchase that herbicide and oil for that purposes?

A For the purpose to spray?

Q Excuse me. For the purpose to spray the 25 acres of crowns?

A That would have been available to -- to spray that, because it was our intention that we were not going to have our crops being sold by someone else in the same market that we were marketing crops.

Bank's in-house counsel, Mr. Curtis J. Schmidt, acknowledged the Bank committed this act to prevent Radloffs from reacquiring the nursery asparagus crops. Mr. Schimdt stated, "The crop was sprayed because if the bank couldn't have it there was no reason Radloff should." (Aff. of Kalenda ¶ 5) (emphasis added). This affidavit dated January 9, 1989, and served upon defendants shortly thereafter, has not been denied in any of Mr. Schmidt's numerous affidavits filed with the trial court or during his deposition. This statement by their in-house counsel acknowledges that Bank knew Radloffs had legal rights to the crops.[11]

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[11]It is Radloffs' basic premise that Bank wrongfully forced them into bankruptcy. Nevertheless, Radloffs did lawfully maintain actual and expectant interests in these perennial crops as more fully addressed later. (Infra p. 27-31.) Perennial crops are fixtures in real estate. (P.T.A. V. II, Tab S, pp. 19-21). No court ordered these perennial crops to be severed from the soil before any (alleged) sale occurred. (TSJ p. 91). Under both the common law and the Uniform Commercial Code, possession of a perennial crop, a fixture of the real

MONY's business records, supplied by Mr. Neal Goplen (its designated representative) show Bank knew that the party who possessed or owned the land had an interest to these fixtures. (Infra. p. 11).

. . .

A. Facts Arising After Bankruptcy

In addition to Bank's daily control over Radloffs' cash, Bank forced Steven Radloff to search for financing alternatives. (Leonard Depo. pp. 87-88). While Steven Radloff was required to do this search, this left Mr. James Ambuehl in charge of Radloffs' farming operation. Id. Bank advised Radloff on how to obtain this financing to the point where Radloffs engaged in a limited partnership called Radloff I. (Leonard Depo. pp. 74-76). . . .

Bank's control developed to a point where the suppliers were calling Bank and asking if particular checks had cleared (Leonard Depo. p. 90) or were negotiable (Leonard Depo. pp. 74-76). Mr. Donald Muller, then Mr. Leonard's subordinate and now his replacement, agreed that the method of approving checks on a daily basis was unusual, even inside of their own banking community. (PTA V. II, Tab O, pp. 74-75). Mr. Muller also agreed that it would be improper to change the terms and conditions of the lending arrangement, even an oral lending agreement, once the borrower had relied. (Id., pp. 77, 80-82).

B. Bank's Misappropriation of Radloffs' Funds

In late 1984, Radloffs acquired enough funds from the ASCS to pay a real estate mortgage payment, which was already late. (PTA V. I, Tab A, Aff. of S. Radloff ¶¶ 12-13, 31). Steven Radloff went to Bank and disclosed to Mr. Leonard that he planned to use this money to pay for the real estate mortgage

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estate, is required before a proper sale is perfected. Infra p. 28.

payment. Id. Mr. Leonard then told him to apply the money to Bank's loans and when Radloffs' grain receipts came in, Bank would pay the real estate mortgage installment. (Id.; Radloff Depo. pp. 191-194). Mr. Leonard agreed that Bank did not have any legal claim to the $23,243.19 that Radloff received from the ASCS. (Leonard Depo. p. 97). He knew that a foreclosure by MONY would have put Bank's and Radloffs' interest in jeopardy. (Id., p. 96). Mr. Leonard further recalls that he asked Steven Radloff to put his money towards Bank's loan. (Id., p. 97). If Radloffs would follow the budget, according to Mr. Leonard's representation, then Bank would be paid off and he would have additional funds to make those checks good.[15] (Id., pp. 94, 97-98). In October and December 1984, Mr. Leonard made calculations on the amount of money owed to Bank, as evidenced by Exhibit A and B to his affidavit (Id., Ex. 2). He also knew of the overdraft status as evidenced by Exhibit A to his affidavit. (Id.). Mr. Leonard testified that the entire debt was suppose to be paid off by selling the corn, bean, and asparagus crops in April of 1985. (Id., p. 100). But the only real proceeds that Bank contemplated receiving by April, 1985, were proceeds from Radloffs' selling of their corn and soybeans. (Id., p. 102). Assuming Radloffs sold all their crops, according to Mr. Leonard's statement (Id., Ex. A & B), they would still be short almost $300,000.00. (Id., p. 102). At the time Mr. Leonard made these representations, he knew that there was no present possibility for Radloffs to pay off their entire indebtedness to Bank before their mortgage would be foreclosed.

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[15]Mr. Leonard made a similar false inducing representation to Radloffs concerning their payment of the chattel mortgage covering a tractor. (PTA V. I, Tab A, Aff. of S. Radloff ¶ 12-13, 31 and exhibits). Mr. Leonard also remembers that the Radloffs were late on their chattel mortgage payments on their tractor to Ford Motor Credit. (Leonard Dep pp. 96-97).

Id.

C. Evidence of Bank's Covert Activity

After inducing Radloffs to rely upon false statements over their real estate and chattel mortgage payments, Bank began to renege on its cash flow arrangement.[16] Id. (PTA V. 1 Tab A, Aff. of S. Radloff ¶¶ 12, 13, 31). Specifically in April 1985, Radloffs requested an advance to cover upcoming harvesting costs. (Id., ¶¶ 13-14 & 19). Bank knew for the first several years that Radloffs' asparagus crops would produce very little cash. (Leonard Depo. p. 69). This would have been the first year the asparagus crops were expected to return a positive cash flow. (PTA V. 1 Tab A, ¶¶ 13-14, 19). Bank agreed to the advance, as had been its custom. (Id.; Tab V & W). Checks were written by Radloffs in reliance upon this statement. Id. Later in April, Steven Radloff recalls that Mr. Leonard told him that a new entity had to be established in order to better account for expenses between Circle Sir Farms, which managed crops owned by Radloffs alone, and those crops he owned in the partnership known as Radloff I. (PTA V. III, Tab 1, ¶ 11). Steven Radloff wrote the $10,000 check payable to Country Fresh Produce (hereinafter "CFP") on April 29, 1985, in reliance upon Mr. Leonard's representation that this company was controlled by the Radloffs. Id. Unbeknownst to Radloffs, the check was later endorsed by Mr. Ambuehl and deposited into the new CFP checking account, which

[16]Meanwhile, Bank completed a financial statement that shows Radloffs' net worth of $657,343.00 as of March 25, 1985 (PTA V. I, Tab J, Ex. 2), and an expectant net future income of $16,000,000.00 over fifteen (15) years. (Ex. to Plaintiffs' Supplement Answers to Defendants' First Set of Interrogatories).

had been set up on the same day of April 29, 1985.[17] (PTA V. III, Tab 1 Aff. of S. Radloff ¶ 11 & Ex. D; See also, PTA V. I, Tab A Radloff Aff. ¶ 18); (Ex. D. DFP1 Admin.).

When the checks Radloffs had written, in reliance on this course of dealing (before the $10,000.00 - CFP transaction), were presented for negotiation, Mr. Leonard added a new additional condition in order to clear the checks: namely, Radloffs were required to sign over their operations to Bank. Id. If the operations were not signed over, Bank threatened that Radloffs would be turned over to the criminal authorities for writing "bad" checks. Id.

D. Bank's Takeover of Radloffs' Business Assets

On May 8, 1985, Bank and Mr. Ambuehl took over Radloffs' operation, by duress of criminal prosecution, under CFP.[18] (Ex.A DRP1 Admin.). This is the May 8, agreement. Id. The funds from this transaction were deposited in the new CFP account. (Ex. C. DFP1 Admin.). Bank appointed Mr. Ambuehl to be its farm manager. (Id., and PTA V. 1, Tab G, Ex. G to G-2). Up until that time, Mr. Ambuehl worked for Radloffs.[19] Id. Mr.

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[17]One day later, April 30, 1985, Mr. Ambuehl wrote out a check to a third party, in the sum of $16,731.00, not out of the new CFP account, but out of Radloffs' account in which no money was deposited. (Muller Depo. Ex. 3, Tab 8).

[18]One company which filed criminal charges (Evergreen Equipment) against Steven Radloff was a Bank customer and Mr. Ambuehl's former employer. (PTA V. III, Tab 1, ¶ 5).

[19]Bank speculates that because Radloff spoke to his attorneys on May 7, 1985, for one (1) hour, that he consulted them about this May 8, 1985, agreement; therefore, Bank should be exonerated from their wrongdoing. (TSJ pp. 68-69). An intra-office memo exists from that meeting (Appx. p. 78); the May 8 agreement is not discussed. Beyond that speculation, there is no evidence Radloffs' former attorneys knew of Bank's covert dealings or were ever engaged

Ambuehl was paid $1,200.00 by Bank to defeat Radloffs' interests.[20] (Check No. 8, Ex. C. DFP1 Admin.). Bank began to demand the transfer of all Radloffs' interests in personal and real property. (PTA V. I, Tab A, Aff. of S. Radloff ¶ 20).

Radloffs were forced into bankruptcy on June 20, 1985, the same date scheduled for the mortgage foreclosure sale on their real estate interests. (PTA V I, Tab F, Ex. 5, p. 3).

E. Abandonment of Claims by Trustee

1. Radloffs' received right to sue Bank from Trustee. Radloffs' basic pre-bankruptcy claim is that Bank wrongfully forced them into bankruptcy, thus Bank should not benefit.

Mr. Radloff testified in his deposition and in a separate affidavit, that he felt that some of Bank's activity was not just. (E.g., PTA V. III, Tab 1). At one point, Mr. Leonard reminded Mr. Radloff about life's golden rule; "[t]he man with the gold, makes the rules." (Radloff Depo. p. 98). Mr. Radloff is not a lawyer, but he did begin to gather information in October-November 1985 so he could ask an attorney. (PTA V. I, Tab A. ¶ 26). This information was missing after Bank obtained access to his office in November 1985. (Id.). Thus, neither he nor his attorneys were aware of the deceit conducted by Bank until discovery in this lawsuit. (E.g., PTA V. III, Tab 1).

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to conduct an analysis of the Radloff-Bank transactions. (Aff. of Kutscheid).

[20]This action, along with his denial of making physical threats, makes the adjudicated facts in State v. Ambuehl, 176 N.W.2d 893 (Minn. 1970), material to the jury's determination of his credibility. As a police officer, this man participated in a burglary ring against three merchants in Benton County. (Ambuehl Depo. April 5, 1990, p. 8, Tab N). While Mr. Ambuehl was an employee (@ 1975) for Menard's Inc., the criminal authorities were again contacted. (PTA V. II, Tab N, Menard's Depo. p. 17). Further, during his tenure as Bank's farm manager, Mr. Ambuehl threatened two other persons with bodily hart (1986). (Statement of R. Swensen, PTA V. III, Tab 2).

2. Radloffs and their attorneys were unaware of Bank's secret payments and diversion of funds to Mr. Ambuehl. Prior to the trustee's abandonment to Radloffs of their right to sue Bank, no file, memorandum or other evidence exists to show that Radloffs' attorneys knew that what Bank did was illegal. (E.g., Aff. of Kutscheid). All these pre-bankruptcy wrongs; Bank's payment of Ambuehl of $1,200.00, Bank's diversion of Radloffs' $10,000.00 to Ambuehl, Bank's agreement with Ambuehl to secretly open the CFP account, (all of which predated the May 8, Agreement) were intended to overtake Radloffs' operation regardless of their consent.

3. Mr. Kalenda's disclosure to Mr. Calvert was prior to the bombing and based on his knowledge. In February 1986, Mr. Kalenda asked Mr. Calvert to abandon (convey) to Radloffs' their pre-bankruptcy claims against Bank. (Bank Ex. B, Item 2; Kalenda Depo. p. 42-45). Mr. Kalenda told Mr. Calvert that he had no idea whether they were viable. Id. Mr. Calvert, a licensed practicing attorney who represents the interests of all creditors, analyzed this request for nearly two (2) months. (Appx. pp. 88-90). After Mr. Calvert weighed the costs of pursuing Bank, coupled with the risk of success and the Bank's offset, he then abandoned (conveyed) the claims to Radloffs. (Id). Mr. Calvert signed his first abandonment document on March 14, 1986, but withheld it during his deliberations. (Id). Then on April 10, 1986, he signed the second abandonment, fixed the value of $100.00, and his superiors (U. S. Trustee) approved, enabling the Radloffs to sue the Bank for all prebankruptcy wrongs. (Bank's Ex. A, Item 27). This procedure was in full accordance with the bankruptcy laws 11 U.S.C.S. §§ 102, 365, 554; Bankr. R. 6007; and Local Rule 115(b).

Without facts or standing, Bank now argues that Radloffs

defrauded the interim trustee. The only owner of the right to make such a claim is Mr. Calvert; he has never made this claim nor will he. (PTA V. III, Tab 6, p. 53). From Mr. Calvert's deposition pages 52 and 53, (Id.), we read:

Q. Just so I have it clear, you have no intent in coming into the State Court case that Radloff commenced against First American National Bank?

A. I have discussed that briefly with the District U.S. Trustee, Mark Webber, and he concludes, or his statement to me was I couldn't do it.

Q. Can you give me the reason why?

A. Because an abandonment is an abandonment is an abandonment, and once it's gone, it's gone.

The U. S. Trustee (Mr. Calvert's superiors), after having read Radloffs' complaint in this lawsuit, refused to take any action to nullify Mr. Calvert's prior conveyance. (Id.) In fact, the bankruptcy case was not closed until November 28, 1989, with full knowledge of this case at bar. (App. p. 57).

IV. STANDARD OF REVIEW

On review of summary judgment motion this court must determine whether a genuine issue of fact exits and whether the trial court erred in its application of law. Offerdahl v. University of Minnesota Hospitals and Clinics, 426 N.W.2d 425, 427 (Minn. 1988). All facts and reasonable inferences must be taken and read in a light most favorable to the nonmoving party. Grondahl v. Bulluck, 318 N.W.2d 240, 242 (Minn. 1982). On summary judgment this court's function is not to weigh the evidence and determine the truth, rather it is simply to determine whether there is a genuine issue of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Wexler v. Brothers Entertainment

Group, Inc., No. CO-90-78, Fin & Comm. June 15, 1990, p. B-9. When questions of law are raised this court is free to conduct an independent review. Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 483 (Minn. 1985).

Not only are there triable issues to be decided by a jury, here usurped by the trial court (See In Re Knickerbocker), but there are procedural errors to be noted.

Common sense and the constitutional rights to due process and a jury trial dictate that claims must be addressed before defenses. Lytle v. Household Mfg., Inc., 110 S. Ct. 1331, 1337 (1990). If a court would disagree with a jury's finding, it must enter all judgments pursuant to that verdict, even if the court's equity findings would disagree. Id. If a jury finds that Bank committed any unlawful pre-bankruptcy act against Radloffs, the trial court cannot estop Radloffs for it must conclude Bank has unclean hands. (Infra p. 44-46).

. . . .

F. Bank Holding Act (a Pre-Bankruptcy Claim)[29]

In the case of Swerdloff v. Miami National Bank, 584 F.2d 54, 57 (1978), the facts are similar but less egregious to Radloffs' claim. (Appx. p. 124). In sum, Swerdloffs entered into a written account receivable finance agreement; when they became highly

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[29]Under U.S.C.S. § 1972 (1) (a) & (c), [A] bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration of any of the foregoing, on the condition or requirement.

(A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit or trust service; [or,]

. . . .

(C) that the customer provide some additional credit property or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit or trust service.

dependent on the agreement, Miami National added a new (unwritten) term. Miami National required Swerdloffs' to transfer 51% of their business to another customer of the bank. Swerdloffs refused. Miami National allegedly retaliated by terminating their financing agreement. Swerdloffs' business became worthless, it filed bankruptcy, then they sued.

Under 12 U.S.C.S. § 1972, the Fifth Circuit Court of Appeals held that a bank is prohibited from demanding this additional property as a condition of continuing their financing commitment and reversed summary judgment. Id.

Radloffs were unaware of the secret payments and diversion of funds to Mr. Ambuehl; latent additional property. Radloffs certainly contest (as the Swerdloffs) that Bank would no longer honor its arrangement unless its business operations were turned over (the May 8, 1985, agreement) to Bank. As in the Swerdloff case, Bank threatened to put Radloffs out of business. (PTA V. I, Tab A, ¶ 19). Radloffs were further induce by fraud and duress to turnover their operations. (Supra pp. 16-18). Bank's own employees (Ms. Sauer and Mr. Muller) agree that these and other actions were unusual and improper. Id.

In Amerifirst Properties Inc. v. FDIC, 880 F.2d 821, 826 (5th Cir. 1989), the complaint stated a claim alleging the bank had orally promised to lend money. When a bank agrees to lend money, it extends credit for the purpose of the BHCA, regardless whether it ultimately funded the loan. Id. at 825.

Although Radloffs' have established an unlawful restraint of trade, this proof is unnecessary for a claim under the Bank Holding Act. See, S. Rep. 1084, 91st Cong, 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News 5519, 5558 (Supplementing views, Senator Edward Brooks), cited with approval by, Sharkey v. Security Bank & Trust Co., 651 F. Supp.

1231, 1239 (D.C. Minn. 1987); JST Properties v. First National Bank of Glencoe, 701 F. Supp. 1443, 1450-51 (D.C. Minn. 1988).

Here, the trial court ruled that Bank's placement of Mr. Ambuehl in Radloffs' operation is not actionable.[30]

(Tr. Op. Appx. p. 26). None of the cases cited by the trial court, supporting its opinion, had facts where the lender established a course of dealing with borrowers through an unwritten, piecemeal financing arrangement; the borrowers' operations were subject to the daily supervision of lender; the lender secretly diverts borrowers' funds before the takeover; the lender paid the replacing manager before the takeover; and, the lender threatened borrowers with criminal prosecution before the takeover agreement was executed.

Mr. Richard Hillyer, Radloffs' liability expert, testified, based on his training, education, thirty-three years of experience in the banking industry, and after review of all relevant depositions and documents that "Bank exceeded its rights by [among other things] managing the borrower . . . [and] . . . Bank coerced borrower to agree to and enter into agreement that may not have been in the borrowers best interest." (PTA V. III, Tab 3). He

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[30]In those cases holding a lender's demand for a new manager as nonactionable under the BHCA, courts' cited specific factual deficiencies that, if they existed (as they do in Radloffs' case) such evidence would support a triable issue. For example, in Tose v. First Pennsylvania Bank, 648 F.2d 879, 897 (3rd Cir. 1981) the court stated "there is no evidence that Tose's ouster in favor of Barnes was made a "condition or requirement of a loan to the Eagles or to Tose"; under these circumstances, "[it] was not a demand for a "service...other than those related to and usually provide in connection with a loan.". In B.C. Recreational Industries v. First Nat'l of Boston, 639 F.2d 828, 832 (1st Cir. 1981) the court found that defendant's replacing manager had no financial connection with Bank. In Parson Steel Inc. v. First Alabama Bank of Montgomery, 679 F.2d 242, 246 (11th Cir. 1982), the court held that the plaintiff (after a jury trial) failed to establish facts from which the existence of a tying arrangement benefiting the bank could reasonably [be] inferred.

concluded that "the above are not traditional banking practices." Id. Ms. Sauer and Mr. Muller agree that certain practices are unusual for their own employer. (Supra pp. 16-18). A triable issue exists.

We ask this court to reverse the trial court grant of Bank's summary judgment on this Bank Holding Act claim.

. . . .

[Bank had] financial control over Radloffs' affairs through its piecemeal and after-the-fact approval of expenditures. Bank's officers agree that the Radloffs' situation was very unusual for Bank. (PTA V. II, Tab R, Sauer Depo. p. 29). For two years Radloffs' cash was under the daily supervision of Bank. After gaining their dependence Bank began a scheme of deceit in which they never fully disclosed the underlying facts. The circumstances surrounding the April-May, 1985 deceit are shocking.

. . .

VI. DEFENDANTS' DEFENSES

Bank failed to conclusively prove they are entitled to any of their defenses.

. . . .

B. Estoppel

1. Radloffs did not have knowledge. No evidence exists to show Radloffs' were aware of Bank's covert pre-bankruptcy activities. (Supra, p. 20-22). Moreover, Radloff were not required to raise these claims in any prior proceeding. Bankr. Rule 7013; D-1 Enterprises v. Commercial State Bank, 864 F.2d 36, 39 (5th Cir. 1989).

2. Bank's bad faith prevents estoppel. Either equitable or judicial estoppel is not available to Defendants since they have come to this court with unclean hands. They benefitted by forcing Radloffs into bankruptcy and they committed unlawful

and criminal acts. Bank violated Federal law under 18 U.S.C.S. § 1951, by wrongfully coercing Radloffs. U.S. v. Furey, 491 F. Supp. 1048, (E.D. Pa) aff'd, 636 F.2d. 1211 (3rd Cir. 1980). Bank violated the Bank Holding Act and the restraint of trade statutes, and committed fraud.

Bank ratified all acts of Mr. Leonard, Mr. Schmidt, all FANB employees, and Mr. Ambuehl that occurred prior to bankruptcy by their purchase of any rights the bankruptcy estate still owned to sue these persons. (Bank Ex. A, Item 29).

In Johnson v. Freeberg, 170 Minn. 594, 228 N.W.2d 159, 160-61 (1929); the unconscionable conduct in this case was the misrepresentation as to the adequacy of the consideration paid for real property. . . .

3. Bank as an actor, had knowledge of its own deceit. Bank had knowledge of its own illicited behavior, may be a question of facts only because of the unfounded denials of Bank by the same. To the extent these are questions of facts, they are to be resolved at a trial on the merits. O'Donnell v. Continental Casualty Company, 263 Minn. 326, 116 N.W.2d. 680, 684 (1962); Mason v. Spiegel, Inc., 610 F. Supp. 401, 403 (D.C. Minn. 1985) (J. Murphy). It is fairly clear, however, that Bank engaged in conduct that itself should have placed them on notice to Radloffs' claims to deny their defense of estoppel.

Bank comes to this court with unclean hands for Radloffs' pre-bankruptcy and post-bankruptcy claims.

4. Equitable estoppel. For both equitable and judicial estoppel, the trial court's holding rests on a false premise; namely the Bank's right to an offset is extinguished. From the time of their first complaint (¶ 33), affirmed in their Amended Complaint, July 14, 1988 (¶ 33), and in their Third Amended Complaint (¶ XV), Radloffs accepted Bank's right to offset its alleged losses

against their claims.[32]

[32]Radloff pled in each instance the sum of $657,343. This number is the net equity figure indicated in the March 25, 1985 balance sheet, which is in Mr. Leonard's handwriting. (PTA V. I, Tab J. Ex. 2).

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Steven Radloff and
Barbara Radloff

Case No. BKY 5-85-162
Debtor(s): Chapter 7 Case.

NOTICE, REPORT, MOTION AND CERTIFICATE UNDER LOCAL RULE 115(b) FOR SALE OF PROPERTY UNDER $1500, ABANDONMENT OF PROPERTY, LEASE OR PROPERTY, OR SETTLEMENT OF CONTROVERSY, WHERE CREDITOR HAS REQUESTED NOTICE UNDER BANKRUPTCY RULE 2002(i)

TO: The United States Trustee and the other entities that have requested notice.

Notice On Feb. 25, 1987, or as soon thereafter as the transaction may be completed, subject to objection under applicable rules, the undersigned trustee will (circle one) sell property, lease property, abandon property, or settle a controversy, as follows:

quit-claim whatever interest the estate may have in the property described in the attached Exhibit A

To: Steven Radloff

price: $10

reason: The property has been foreclosed (sheriff's sale January, 1987) and leased for crop year 1987

. . . .

Dated and
Executed on: Feb. 25, 1987. Signed: /s/ Sam Calvert, Trustee

Name: Sam V. Calvert
Address: Box 1044
St. Cloud, MN 56302
Telephone: 612/255-1456

Certificate The United States Trustee hereby certifies that the United States Trustee has reviewed and agrees with the reduced notice and sale, abandonment, in the foregoing instrument.

Dated: Feb. 27, 1987 WILLIAM F. WESTPHAL, SR.
United States Trustee
By /s/ Andrew J. Schmid

EXHIBIT A

South half of Northeast Quarter (S 1/2 of NE 1/4) of Section Twenty (20), Township One Hundred Thirty (130), Range Twenty-nine (29), less the North 365 feet of the East 485 feet thereof, Morrison County, Minnesota.

40 acres: Northwest Quarter of Northeast Quarter (NW 1/4 of NE 1/4), Section Twenty (20), Township One Hundred Thirty (130), Range Twenty-nine (29) Morrison County Minnesota.

86 acres: West Half of Northwest Quarter (W 1/2 of NW 1/4), less the North 208 feet of the East 800 feet of Northwest Quarter of Northwest Quarter (NW 1/4 of NW 1/4) and the North 495 feet of the Northwest Quarter of Southwest Quarter (NW 1/4 of SW 1/4) of Section Twenty (20, Township One Hundred Thirty (130), Range Twenty-nine (29), described as follows, to-wit: Beginning at the Southwest corner of the North 495 feet of said Northwest Quarter of Southwest Quarter (NW 1/4 of SW 1/4); thence East along the South line of said North 495 feet of the Northwest Quarter of Southwest Quarter (NW 1/4 of SW 1/4) for a distance of 660 feet; thence Northwesterly on a straight line to a point on the West line of said Section Twenty (20) at a point 660 feet North of the point of beginning; thence South 660 feet to the point of beginning, Morrison County, Minnesota.

Home Farm - 100 acres: Northeast Quarter of Southwest Quarter (NE 1/4 of SW 1/4), Southeast Quarter of Northwest Quarter (SE 1/4 of NW 1/4), South Half of Northeast Quarter of Northwest Quarter (S 1/2 of NE 1/4 of NW 1/4), Section Twenty (20), Township One Hundred Thirty (130), Range Twenty-nine (29), Morrison County, Minnesota.

DEPOSITION OF SAMUEL V. CALVERT

The Deposition of SAMUEL V. CALVERT, taken pursuant to Notice of Taking Deposition, taken before Mimi A. E. Binson, a Notary Public in and for the County of Hennepin, State of Minnesota, taken on the 30th day of January, 1990, at 110 Sixth Avenue South, Suite 200, St. Cloud, Minnesota, commencing at approximately 10:40 a.m.

(At this time CALVERT Deposition Exhibit Numbers 1 and 2 were marked for identification by the Court Reporter.)

SAMUEL V. CALVERT, the Witness in the above-entitled matter after having been first duly sworn deposes and says as follows:

CROSS-EXAMINATION

BY MR. PINOTTI:

Q. Please state your name for the record.

A. Sam Calvert.

Q. And your middle initial, please?

A. V.

Q. Mr. Calvert, you have provided for the Plaintiff and his Counsel today a file from your office as an interim trustee in the Radloff bankruptcy, correct?

A. Well, technically, the interim trustee file consists only of the petition and the appointment, but this is the file on the Radloff case from my office. I should state now, because I don't believe we got it on the record earlier, that at the suggestion of the U.S. Trustee, I want to reserve any right I might have to objecting to the introduction or production of these documents, but you are free

to take a look at these documents today.

....

Q. Mr. Calvert, I have here what is shown as Calvert Deposition Exhibit 18. Can you identify that, please.

A. This is the lease to which Mr. Pinotti previously referred regarding the lease of some real property what is here styled Section 23, Prairie Township (sic.) to Steven Radloff.

Q. And that is signed by you?

A. Yes. The one Mr. Pinotti had was notarized. This one isn't.

Q. Mr. Calvert, I would like you to refer to Deposition Exhibit 4 and Deposition Exhibit 18. Do those appear to be leases of property in Section 20, Green Prairie Township, Morrison County, which overlap in time periods?

A. Well, if they're the same real property. The Deposition Exhibit Number 18 is a much more general description. It only says 230 acres, and it doesn't even give the township or range; whereas, Deposition Exhibit Number 4 has a fairly precise legal description.

Q. Was the property shown in Deposition Exhibit 4 included, according to your recollection, in the property that is described in Deposition Exhibit 18?

A. My recollection is that the property included in Deposition Exhibit Number 4 was leased to the bank in order that it might remove some property and they were going to be out of there in a certain period of time, presumably by May 15, 1986, and that meant I had the balance of the crop year to dispose of, and Mr. -- I don't know if it's Steven or Irvin, wanted to rent that for the balance of the crop year.

(Emphasis added).